CRIMINAL YEAR SEMINAR

April 14, 2017 - Tucson, Arizona
April 21, 2017 - Phoenix, Arizona
May 12, 2017 - Chandler, Arizona

2016 CASE CITATIONS
ARIZONA EVIDENCE REPORTER
CONSTITUTIONAL LAW REPORTER - UNITED STATES
CONSTITUTIONAL LAW REPORTER - ARIZONA
CRIMINAL CODE REPORTER
CRIMINAL RULES REPORTER
FUNDAMENTAL ERROR REPORTER

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ARTICLE 1. GENERAL PROVISIONS.

Rule 103(a) — Preserving a Claim of Error.

103.a.026 In a criminal case, hearsay evidence admitted without objection becomes competent evidence for all purposes unless its admission amounts to fundamental error.

State v. Ingram, 239 Ariz. 228, 368 P.3d 936, ¶ 23 n.6 (Ct. App. 2016) (officer testified personnel at U.S. Marshals Service said defendant was possibly armed with .40 caliber pistol; although this appeared to be hearsay, defendant objected on basis of "foundation" and not "hearsay").

103.a.050 An objection at trial for one reason or purpose does not preserve for appeal a claim of error based on a different reason or purpose.

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 15–25 (Ct. App. 2016) (when expert witness testified about testing report prepared by another expert, defendant objected on basis that report was cumulative, and when state offered interactive CD, defendant objected that it was not relevant; court held this did not preserve defendant's hearsay objection on appeal and that defendant had failed to establish because differences in witness's testimony and statements in report would not have made practical difference to jurors).

Rule 106. Remainder of or Related Writings or Recorded Statements.

106.005 A recorded statement may include electronic recordings, such as a cell-phone video.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶ 8 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds of recording; court held trial court erred in ordering that, because full copy was not available, it would not admit edited or cropped video).

106.007 Rule 106 is a rule of inclusion, not a rule of exclusion.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶ 10 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds of recording; court held trial court erred in ordering that, because full copy was not available, it would not admit edited or cropped video).

106.010 When a party introduces a portion of a writing or recorded statement, the other party may require the introduction of any other portion or any other writing or recorded statement that in fairness ought to be considered with the portion admitted, which means a portion of a statement that is necessary to qualify, explain, or place in context the portion of the statement that is already admitted.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶ 12 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds of recording; court noted state was not involved in recording or editing video, and because there were no additional portions to admit, Rule 106 did not apply, so trial court erred in ordering that it would not admit edited or cropped video because full copy was not available).

ARTICLE 3. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in Civil Cases Generally.

380. Property — Community.

380.010 There is a strong legal presumption that all property acquired during marriage is community property, except for property acquired by gift, devise, or descent, and that presumption applies even though title is taken in the name of only one spouse.

In re Foster v. Foster, 240 Ariz. 99, 376 P.3d 702, ¶¶ 7–13 (Ct. App. 2016) (trial court did not abuse discretion in determining husband failed to establish that he inherited certain guns from his brother).

ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence." (Criminal Cases.)

401.cr.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 150–55 (2016) (defendant contended trial court erred in admitting autopsy photograph; court held photograph was relevant because "the fact and cause of death are always relevant in a murder prosecution"; court held photograph also helped to corroborate medical examiner's explanation of victim's injuries).

401.cr.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 150–55 (2016) (defendant contended trial court erred in admitting autopsy photograph; court held photograph was relevant because "the fact and cause of death are always relevant in a murder prosecution"; court held photograph also helped to corroborate medical examiner's explanation of victim's injuries).

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 34–41 (Ct. App. 2016) (defendant contended autopsy toxicology report indicated presence of methamphetamine in victim and that victim had been previously involved in drug sales 2 years prior showed someone else might have had motive to kill victim; court held trial court correctly ruled this evidence was not relevant and that its prejudicial effect substantially outweighed any probative value).

401.cr.120 For evidence of third-party culpability to be relevant, it must tend to create a reasonable doubt about the defendant's guilt; if evidence shows that another person had the motive and opportunity to commit the crime, this would tend to create a reasonable doubt about the defendant's guilt, which would make the evidence relevant and the trial court should admit it.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 159–67 (2016) (defendant contended trial court erred in precluding evidence of injuries victim sustained several days before she was killed; court held trial court could have reasonably found that evidence did not create reasonable doubt about the defendant's guilt).

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 34–41 (Ct. App. 2016) (defendant contended autopsy toxicology report indicated presence of methamphetamine in victim and that victim had been previously involved in drug sales 2 years prior showed someone else might have had motive to kill victim; court held trial court correctly ruled this evidence was not relevant and that its prejudicial effect substantially outweighed any probative value).

401.cr.350 A photograph is admissible if relevant to an expressly or impliedly contested issue.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 150–58 (2016) (defendant contended trial court erred in admitting autopsy photograph; court held photograph was relevant because "the fact and cause of death are always relevant in a murder prosecution"; court held photograph also helped to corroborate medical examiner's explanation of victim's injuries; court rejected defendant's contention that state could have used other evidence to explain what photograph depicted).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Civil Cases.)

403.civ.010 If evidence is relevant and therefore admissible, a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

Stafford v. Burns, 241 Ariz. 474 , 389 P.3d 76, ¶¶ 31–33 (Ct. App. Jan. 17, 2017) (plaintiffs brought claims for medical malpractice and wrongful death after their son died of methadone overdose; plaintiffs contended evidence that post-mortem urine sample contained cocaine metabolites was unfairly prejudicial and thus trial court erred in admitting that evidence; court held trial court properly limited admissible of that evidence and allowed plaintiffs to recall their toxicologist to address that issue on rebuttal, thus trial court did not abuse discretion in admitting that evidence).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Criminal Cases.)

403.cr.010 If evidence is relevant and therefore admissible, a trial court may not exclude that evidence unless the opposing party establishes that the evidence poses the danger of *unfair* prejudice, and establishes that the *unfair* prejudice *substantially* outweighs the probative value.

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 34–41 (Ct. App. 2016) (defendant contended autopsy toxicology report indicated presence of methamphetamine in victim and that victim had been previously involved in drug sales 2 years prior showed someone else might have had motive to kill victim; court held trial court correctly ruled this evidence was not relevant and that its prejudicial effect substantially outweighed any probative value).

403.cr.115 If a photograph has little bearing on any expressly or impliedly contested issue, or if a photograph is merely duplicative to other photographs, its relevance may be limited, and thus if that photograph is prejudicial, its probative value may be substantially outweighed by the danger of unfair prejudice.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 150–58 (2016) (defendant contended trial court erred in admitting autopsy photograph; court held photograph helped to corroborate medical examiner's explanation of victim's injuries; court rejected defendant's contention that state could have used other evidence to explain what photograph depicted; and court held photograph was not needless cumulative because it was only one that illustrated position of shooter).

Rule 404(b). Other crimes, wrongs, or acts. (Criminal cases.)

404.b.cr.220 In determining whether the **extrinsic** evidence of another crime, wrong, or act is relevant to show ***modus operandi*** and thus to prove **identity**, the trial court should determine whether there are similarities where normally there would be expected to be differences.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 54–67 (2016) (defendant contended trial court erred by denying his motion to sever and by permitting joinder of 82 counts charging 74 felonies; court noted same gun was used in several of the felonies and that DNA linked defendant to several of the felonies, moreover, defendant's *modus operandi* was similar in various ways across the various crimes; further, trial court considered factual differences among the crimes; trial court thus did not err in joinder).

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 96–102 (2016) (defendant contended trial court erred in admitting evidence that he had been previously convicted of kidnapping, sexual assault, sexual abuse, and aggravated assault on two sisters; defendant conceded his convictions established other acts and that they were relevant, but contended they were not sufficiently similar to crimes charged in this case; court held they were sufficiently similar to establish identity).

404.b.cr.240 Extrinsic evidence of another crime, wrong, or act is admissible if it is relevant to show **knowledge**.

State v. Jean, 239 Ariz. 495, 372 P.3d 1019, ¶¶ 4–10 (Ct. App. 2016) (officers stopped truck that owner was driving; defendant was in sleeper berth and claimed he was simply driver-in-training; search of truck revealed 2,140 pounds of marijuana; defendant contended trial court erred when it admitted 1999 incident when Missouri HP officer stopped truck, found three people in truck and defendant in sleeper berth, one of the others claimed to be driver-in-training, and 1774 pounds of marijuana was in truck; court held trial court did not err in admitting this other act evidence to show knowledge). **(PR pending.)**

404.b.cr.500 Evidence of another crime, wrong, or act is admissible if it is factually or conditionally relevant, which means the proponent is able to produce sufficient evidence from which the trier-of-fact could conclude, by clear and convincing evidence, that the other act happened, the person committed the act, and the circumstances of that act were as the proponent claims; proof beyond a reasonable doubt is not necessary.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 96–102 (2016) (defendant contended trial court erred in admitting evidence that he had been previously convicted of kidnapping, sexual assault, sexual abuse, and aggravated assault on two sisters; defendant conceded his convictions established other acts and that they were relevant, but contended they were not sufficiently similar to crimes charged in this case; court held they were sufficiently similar to establish identity).

State v. Jean, 239 Ariz. 495, 372 P.3d 1019, ¶¶ 4–10 (Ct. App. 2016) (officers stopped truck that owner was driving; defendant was in sleeper berth and claimed he was simply driver-in-training; search of truck revealed 2,140 pounds of marijuana; defendant contended trial court erred when it admitted 1999 incident when Missouri HP officer stopped truck, found three people in truck and defendant in sleeper berth, one of the others claimed to be driver-in-training, and 1774 pounds of marijuana was in truck; court held trial court did not err in admitting this other act evidence to show knowledge). **(PR pending.)**

Rule 406. Habit; Routine Practice.

406.010 Habit describes a person's regular or semi-automatic response to a repeated specific situation, while character refers to a generalized description of a person's disposition.

Rasor v. Northwest Hosp. LLC, 239 Ariz. 546, 373 P.3d 563, ¶¶ 29–36 (Ct. App. 2016) (plaintiff contended ICU nurse provided deficient care in failing to take steps to minimize bed pressure and in failing to timely discover pressure ulcer; patient records of all ICU patients who had developed pressure ulcers in 4 years preceding plaintiff's injury could be relevant for discovery purposes based on plaintiff's contention that defendant's staff had habit or routine of not following hospital's repositioning procedures). **(PR pending.)**

Rule 408. Compromise and Offers and Negotiations.

408.010 Although evidence of an offer to compromise is not admissible to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction, such evidence is admissible if relevant to some other issue in the litigation.

Murray v. Murray, 239 Ariz. 174, 367 P.3d 78, ¶¶ 14–16 (Ct. App. 2016) (in dispute over parenting time, mother offered father's out-of-court statements, not to support her claim, but instead to prove she and father had reached agreement, thus trial court erred in not considering those statements; court noted nothing in Rule 408 bars evidence offered to prove a settlement resolving a claim).

Rule 410. Pleas, Plea Discussions, and Related Statements.

410.070 A statement of fact form executed in order to participate in a TASC program is not a statement in connection with a plea agreement, and thus is not precluded by this rule.

State v. Gill, 240 Ariz. 229, 377 P.3d 1024, ¶¶ 2–9 (Ct. App. 2016) (after state reduced possession of marijuana charges to misdemeanor and defendant rejected plea offer, parties agreed defendant would participate in TASC; when defendant failed to complete TASC program, state sought to admit statements defendant made in "statement of facts" form). **(PR pending.)**

ARTICLE 5. PRIVILEGES

Rule 501. Physician-Patient.

501.20.045 Redacted non-party medical records may be subject to discovery if the records are relevant and certain precautions are taken to protect patient identities.

Rasor v. Northwest Hosp. LLC, 239 Ariz. 546, 373 P.3d 563, ¶¶ 25–29 (Ct. App. 2016) (plaintiff contended ICU nurse provided deficient care in failing to take steps to minimize bed pressure and in failing to timely discover pressure ulcer; trial court ordered defendant to produce patient records of all ICU patients who had developed pressure ulcers in 4 years before plaintiff's injuries; court held trial court ensured sufficient privacy safeguards by ordering defendant to "redact any confidential patient information from the records produced"; accordingly, trial court's order did not violate physician-patient privilege). **(PR pending.)**

501.20.120 If a defendant raises a "guilty except insane" defense, the defendant waives the physician-patient privilege.

State v. Hegyi (Rasmussen), 240 Ariz. 251, 378 P.3d 428, ¶ 11 (Ct. App. 2016) (defendant hired his own psychologist, who questioned defendant's sanity; court then appointed another psychologist, who opined that defendant met guilty except insane criteria; defendant disclosed both reports to state, but redacted any statements defendant made to psychologist; state then moved to compel disclosure of defendant's redacted statements; court held defendant must provide un-redacted copies of both (1) report of his retained psychologist and (2) report of court-appointed psychologist). **(PR pending.)**

22. Reporter-Source.

501.22.030 In order to overcome the reporter-source privilege under the Media Subpoena Law, the moving party must submit an affidavit meeting six requirements: (1) it must list each item sought; (2) avow that affiant has attempted to obtain each item from all available sources; (3) identify the other sources from which the affiant tried to obtain the material; (4) avow that the information sought is relevant; (5) avow the information is not protected by a lawful privilege; and (6) avow the subpoena is not intended to interfere with the publication activities protected by the First Amendment.

Phoenix Newspapers v. Reinstein, 240 Ariz. 442, 381 P.3d 236, ¶¶ 3–28 (Ct. App. 2016) (defendant was charged with killing one priest and assaulting second priest; reporter published article about incident; defendant requested copy of any notes taken during interviews or meetings with surviving priest; court held affidavit accompanying subpoena duces tecum failed to satisfy two of those requirements: (1) affiant exhausted all other sources for the information; and (2) the information was not protected by any lawful privilege; trial court therefore erred in finding that defendant had overcome reporter's privilege). **(PR pending.)**

26. Waiver by Statute.

501.26.010 A party may waive a privilege as provided by statute.

State v. Hegyi (Rasmussen), 240 Ariz. 251, 378 P.3d 428, ¶ 11 (Ct. App. 2016) (A.R.S. § 13–3993 provides that, if a defendant raises a "guilty except insane" defense, the defendant waives the physician-patient privilege). **(PR pending.)**

ARTICLE 6. WITNESSES

Rule 606(b). Juror's Competency as a Witness — Inquiry into validity of verdict in civil action.

606.b.010 Trial court may consider an affidavit that alleges (A) extraneous prejudicial information was improperly brought to jurors' attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.

American Power Prod. v. CSK Auto, 239 Ariz. 151, 367 P.3d 55, ¶¶ 2–5 (2016) (on breach of contract and negligent misrepresentation claim, trial lasted 12 trial days and included 24 witnesses and 164 exhibits; on Friday afternoon before 3-day weekend, jurors received case at about 2:15; juror's affidavit stated that bailiff had entered jury room, someone asked her how long deliberations typically lasted, and she told them an hour or two should be plenty; jurors returned verdict at 4:13).

606.b.020 When there has been an *ex parte* communication with the jurors, the court does not presume prejudice, and instead conducts a two-prong inquiry: (1) was there an improper communication; and (2) was the communication prejudicial or merely harmless.

American Power Prod. v. CSK Auto, 239 Ariz. 151, 367 P.3d 55, ¶ 11 (2016) (after 12-day trial with 24 witnesses and 164 exhibits, once jurors began deliberations, one juror asked bailiff how long deliberations typically lasted, and bailiff said an hour or two should be plenty; jurors returned verdict after 2 hours; parties agreed bailiff's statement was improper, so court focused on whether information was prejudicial).

606.b.040 If a party requests a new trial based on juror misconduct, if there is a significant question about what occurred or whether the affiant is credible and whether the alleged facts, if true, would establish a basis for granting the motion, the court must hold an evidentiary hearing before ruling on a motion for new trial, but if there is no significant factual question, the trial court may grant or deny a motion for a new trial without holding an evidentiary hearing.

American Power Prod. v. CSK Auto, 239 Ariz. 151, 367 P.3d 55 ¶¶ 12–14 (2016) (juror's affidavit stated bailiff came into jury room, someone asked her how long deliberations typically lasted, and she told them an hour or two should be plenty; because there was no dispute about what had occurred, trial court was not required to hold evidentiary hearing).

606.b.060 When an improper communication creates a structural defect in the trial that deprives a litigant of an essential right, the trial judge must conclusively presume prejudice; in all other cases, because the court may not inquire into the effect of the communication on individual jurors, the court must determine whether the communication would likely prejudice a hypothetical average juror, and the moving party must demonstrate the objective likelihood of prejudice.

American Power Prod. v. CSK Auto, 239 Ariz. 151, 367 P.3d 55 ¶¶ 12–19 (2016) (juror's affidavit stated bailiff came into room, someone asked her how long deliberations typically lasted, and she told them hour or two should be plenty; because bailiff's statement did not relate to any specific or disputed fact or strength of evidence presented by either side, nor did it involve any legal issue, trial court reasonably determined that bailiff's statement had no bearing on issues, thus trial court did not abuse discretion in denying motion for new trial).

Rule 611(a). Mode and Order of Examining Witnesses and Presenting Evidence — Control by the court.

611.a.020 A trial court has discretion to determine the manner of the proceedings, the manner of questioning, and the order of presentation of evidence.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 86–95 (2016) (defendant was charged in 82 counts with committing 74 various felonies; court held trial court did not abuse discretion in allowing separate opening statements before each of 13 "chapters" of charged conduct).

Rule 611(b). Mode and Order of Examining Witnesses and Presenting Evidence — Scope of cross-examination.

611.b.045 A defendant who has been allowed self-representation has the right to cross-examine the witnesses personally, and this right may be abrogated only if the state makes a showing by clear and convincing evidence that such cross-examination will injure the physical or psychological well-being of the witness.

State ex rel. Montgomery v. Padilla (Simcox), 239 Ariz. 314, 371 P.3d 642, ¶ 13 (Ct. App. 2016) (court held trial court erred in "concluding *any* restriction of [defendant's] right to personally cross-examine witness would be 'a violation of constitutional proportion' and reversible error"; court remanded so trial court could determine whether state has presented clear and convincing evidence of individualized and case-specific need for accommodation for each minor victim witness).

Rule 615. Excluding Witnesses.

615.010 Sequestration of witnesses is mandatory when requested in both civil and criminal cases.

Spring v. Bradford, 241 Ariz. 455, 388 P.3d 849, ¶ 10 (Ct. App. 2017) (Rule 615 requires trial court, when requested, to exclude witnesses so they cannot hear other witnesses' testimony).

615.060 This rule does not automatically exempt an expert witness from exclusion.

Spring v. Bradford, 241 Ariz. 455, 388 P.3d 849, ¶¶ 1–2, 11–24 (Ct. App. 2017) (in medical malpractice case, at start of trial, with both parties' agreement, trial court ordered rule of exclusion of witnesses in effect; during trial, defendant's attorney provided expert witnesses with transcripts of testimony by plaintiff's expert witnesses; trial court found defendant's attorney violated exclusion order; court rejected defendant's contention that expert witness is always "essential witness" and therefore not subject to exclusion, but concluded trial court's action of providing instructions to jurors was sufficient to correct any error).

615.070 Even though the trial court has invoked the rule excluding a witness, the trial court may allow an expert witness to review transcribed testimony in order to prepare to testify.

Spring v. Bradford, 241 Ariz. 455, 388 P.3d 849, ¶¶ 12–24 (Ct. App. 2017) (in medical malpractice case, defendant's attorney provided expert witnesses with transcripts of testimony by plaintiff's expert witnesses; trial court noted that, had counsel sought permission, it likely would have allowed both sides' experts to review or observe trial testimony).

615.080 Before a trial court may impose sanctions for a violation of this rule, the moving party must show that the witness did in fact violate the rule and that the witness's conduct prejudiced the party.

Spring v. Bradford, 241 Ariz. 455, 388 P.3d 849, ¶¶ 12–24 (Ct. App. 2017) (in medical malpractice case, defendant's attorney provided expert witnesses with transcripts of testimony by plaintiff's expert witnesses; trial court noted that, had counsel sought permission, it likely would have allowed both sides' experts to review or observe trial testimony; court concluded trial court's action of providing instructions to jurors was sufficient to correct any error).

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses.

701.020 A witness who is not testifying as an expert may give testimony in the form of an opinion if the opinion is limited to one that is (a) rationally based on the witness's perception, (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Ishak v. McClennen, 241 Ariz. 364, 388 P.3d 1, ¶ 18 (Ct. App. 2016) (although state's expert testified sample of defendant's blood showed 26.9 ng/ml of THC, court held lay person could give opinion that defendant was not impaired by marijuana).

Rule 702. Testimony by Expert Witnesses.

702.005 Because the current version of Rule 702 is not a new constitutional rule, it does not apply to trials that ended before the new rule became effective on January 1, 2012, thus *Daubert* and new Rule 702 does not apply to trial that ended before that date.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 144–46 (2016) (defendant contended trial court should have held *Daubert* hearing before admitting testimony of firearm examiner; because trial was in 2011, *Daubert* and new Rule 702 did not apply; because firearm examiner did not rely on any novel theory or process, it was not subject to *Frye*).

702.008 The trial court has discretion whether to set a pre-trial hearing to evaluate proposed expert testimony and may properly decide to hear the evidence and objections during the trial.

Stafford v. Burns, 241 Ariz. 474 , 389 P.3d 76, ¶¶ 29–30 (Ct. App. Jan. 17, 2017) (plaintiffs brought claims for medical malpractice and wrongful death after their son died of methadone overdose; plaintiffs moved to preclude any expert testimony extrapolating timing of son's last methadone injection based on son's post-mortem gastric methadone levels, claiming this was based on "junk science"; court noted both parties presented lengthy and detailed pleadings, cited supporting literature, and attached affidavits containing specific opinions of their other disclosed medical and pharmacologal experts, and concluded trial court did not abuse discretion in not holding pre-trial hearing).

702.010 A witness may be qualified as an expert by training or education.

State v. Romero, 239 Ariz. 6, 365 P.3d 358, ¶¶ 13–16 (2016) (court concluded trial court abused discretion in finding witness whose expertise was in experimental design was not qualified to give opinion on field of firearm identification, and remanded for determination whether error was harmless).

State v. Romero, 240 Ariz. 503, 381 P.3d 297, ¶¶ 4–22 (Ct. App. 2016) (upon remand, court concluded error in precluding expert witness testimony was not harmless).

702.020 A witness may be qualified as an expert by knowledge, skill, or experience.

State v. Romero, 239 Ariz. 6, 365 P.3d 358, ¶¶ 13–16 (2016) (court concluded trial court abused discretion in finding witness whose expertise was in experimental design was not qualified to give opinion on field of firearm identification, and remanded for determination whether error was harmless).

State v. Romero, 240 Ariz. 503, 381 P.3d 297, ¶¶ 4–22 (Ct. App. 2016) (upon remand, court concluded error in precluding expert witness testimony was not harmless).

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 9–12 (Ct. App. 2016) (witness's testimony showed working knowledge of how 3–D confocal microscopy functioned, and although he did not have personal knowledge how mapping software functioned, that did not affect his knowledge and experience with process).

Rule 702(a) — Assist trier of fact.

702.a.040 An expert may testify about behavioral characteristics of certain classes of persons, but may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

State v. Haskie, 240 Ariz. 269, 378 P.3d 446, ¶¶ 15–33 (Ct. App. 2016) (officer responded to 9-1-1 call and found female victim with various bruises and abrasions; prior to trial, victim denied that defendant had assaulted her; state's expert witness on domestic violence testified as "cold" expert; court concluded witness did not engage in offender profiling; witness did go beyond what is permissible when witness testified that "it's very rare" for victim to give false report and more common for victim to minimize or deny what had happened, but to extent that was not permissible, any error was harmless). **(PR pending.)**

Rule 702(c) — Reliable principles and methods.

702.c.011 *Daubert* identified ***five*** non-exclusive factors for courts to consider in determining whether scientific evidence is reliable, the ***first*** of which is: (1) whether the scientific methodology has been tested.

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶ 13 (Ct. App. 2016) (witness's testimony showed 3–D confocal microscopy methodology was testable).

702.c.012 *Daubert* identified ***five*** non-exclusive factors for courts to consider in determining whether scientific evidence is reliable, the ***second*** of which is: (2) whether the methodology has been subjected to peer review, although publication is not *sine qua non* of admissibility of expert testimony.

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶ 13 (Ct. App. 2016) (witness's testimony showed 3–D confocal microscopy methodology was subjected to peer review).

702.c.013 *Daubert* identified ***five*** non-exclusive factors for courts to consider in determining whether scientific evidence is reliable, the ***third*** of which is: (3) the known or potential rate of error when applied.

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶ 13 (Ct. App. 2016) (witness's testimony showed 3–D confocal microscopy methodology was studied sufficiently to establish known or potential rates of error).

702.c.014 *Daubert* identified ***five*** non-exclusive factors for courts to consider in determining whether scientific evidence is reliable, the ***fourth*** of which is: (4) whether the methodology has general acceptance within the relevant scientific community (old *Frye* test).

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶ 13 (Ct. App. 2016) (witness's testimony showed 3–D confocal microscopy methodology was generally accepted within relevant scientific community).

Rule 702(f) Statutes and Rules.

702.f.065 If the party against whom the testimony is offered is or claims to be a specialist or board-certified specialist, then A.R.S. § 12–2604 requires that the expert witness must be a specialist or board-certified specialist and must have devoted a majority of time in the year immediately preceding to occurrence to the active clinical practice in the same health profession as defendant.

St. George v. Plimpton, 241 Ariz. 163, 384 P.3d 1243, ¶¶ 23–27 (Ct. App. 2016) (plaintiffs alleged defendant nurse was negligent in applying pubic pressure during delivery of baby; defendant was licensed registered nurse and certified nurse midwife; plaintiffs' expert was board certified obstetrician/gynecologist; court held trial court correctly ruled that plaintiffs' expert was not qualified under A.R.S. § 12–2604(A) to testify against defendant nurse).

Rasor v. Northwest Hosp. LLC, 239 Ariz. 546, 373 P.3d 563, ¶¶ 9–15 (Ct. App. 2016) (plaintiff contended ICU nurse provided deficient care in failing to take steps to minimize bed pressure and in failing to timely discover pressure ulcer; plaintiff retained as expert board-certified wound-care nurse; court agreed expert was not proper because (1) if ICU nurses are considered specialists, plaintiff's expert was not practicing as ICU nurse for year prior to plaintiff's injury, and (2) if ICU nurses are considered generalists, plaintiff's expert was not practicing as generalist for year prior to plaintiff's injury; court held, however, trial court should have allowed plaintiff's time to obtain proper expert).

Rule 703. Bases of an Expert's Opinion Testimony.

703.110 Although an expert witness is allowed to disclose facts or data not admissible in evidence if they are of the type upon which experts reasonably rely, the expert should not be allowed to act merely as a conduit for the other expert's opinion and thus circumvent the requirements excluding certain types of hearsay statements.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 147–49 (2016) (defendant contended trial court erred by allowing expert to testify that, as part of "second chair process," another unidentified PPD firearms examiner "agreed with his identification"; court held expert did not act as mere "conduit" for other examiner's opinion, and it was instead part of varication process PPD crime laboratory generally followed in this type of case).

ARTICLE 8. HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay.

801.010 Admission of an out-of-court statement that is non-hearsay is not "testimonial evidence" and does not violate the confrontation clause of the United States Constitution.

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 26–33 (Ct. App. 2016) (testing report prepared by another expert was offered to show basis of expert's opinion, thus it was not hearsay and did not violate confrontation clause).

Rule 801(a) — Statement.

801.a.010 If verbal or nonverbal conduct is not intended to be an assertion, by definition it is not hearsay, even if it is offered as evidence of the declarant's implicit belief of a fact.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 21–22 (2016) (state intended to use 31-second cell-phone video recording of fight; defendant contended video contained multiple levels of hearsay, including conduct and people making statements heard on video; court noted conduct on video was not intended as an assertion, thus video was not hearsay).

Rule 801(c) — Hearsay.

801.c.010 Hearsay is an oral, written, or non-verbal assertion, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 26–33 (Ct. App. 2016) (testing report prepared by another expert was offered to show basis of expert's opinion and not for truth of matter asserted, thus it was not hearsay and did not violate confrontation clause).

801.c.030 If the out-of-court assertion is admitted for a purpose other than to prove the truth of the matter asserted, then its admission does not violate the right of confrontation.

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 26–33 (Ct. App. 2016) (testing report prepared by another expert was offered to show basis of expert's opinion and not for truth of matter asserted, thus it was not hearsay and did not violate confrontation clause).

801.c.035 If an expert witness discloses the facts or data only for the limited purpose of disclosing the basis of the opinion, they are not substantive evidence and admission of those facts and data does not violate the right of confrontation, and because they are not admitted to prove the truth of the matter asserted, they are not hearsay.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 147–49 (2016) (defendant contended trial court erred by allowing expert to testify that, as part of "second chair process," another unidentified PPD firearms examiner "agreed with his identification"; court held expert did not act as mere "conduit" for other examiner's opinion, and it was instead part of verification process PPD crime laboratory generally followed in this type of case).

State v. Foshay, 239 Ariz. 271, 370 P.3d 618, ¶¶ 26–33 (Ct. App. 2016) (testing report prepared by another expert was offered to show basis of expert's opinion and not for truth of matter asserted, thus it was not hearsay and did not violate confrontation clause).

Rule 802. The Rule Against Hearsay.

802.030 If hearsay evidence is admitted without objection, it becomes competent evidence admissible for all purposes, unless its admission amounts to fundamental error.

State v. Ingram, 239 Ariz. 228, 368 P.3d 936, ¶ 23 n.6 (Ct. App. 2016) (officer testified personnel at U.S. Marshals Service said defendant was possibly armed with .40 caliber pistol; although this appeared to be hearsay, defendant objected on basis of "foundation" and not "hearsay").

Rule 803(1). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness — Present sense impressions.

803.1.010 A hearsay statement is admissible as a present sense impression if (1) the declarant perceived the event or condition, (2) the statement described the event or condition, and (3) the declarant made the statement while perceiving the event or condition or immediately thereafter.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 21–23 (2016) (state intended to use 31-second cell-phone video recording of fight; defendant contended video contained multiple levels of hearsay, including conduct and people making statements heard on video; court noted that, to extent persons could be heard making statements, those would qualify as present sense impressions or excited utterances).

State v. Wright, 239 Ariz. 284, 370 P.3d 1122, ¶¶ 8–17 (Ct. App. 2016) (undercover officer's truck had one-way radio transmitter and digital audio recorder hidden inside it; officer asked person to help him buy methamphetamine and described actions of person and defendant that resulted in person's obtaining methamphatamine; defendant objected that audio recording from officer's truck was hearsay; court held it was present sense impression; defendant contended that, because officer knew recording could be used at trial, he had motive to fabricate; court noted that officers were maintaining radio contact for officer safety and thus had no motive to fabricate).

Rule 803(2). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness — Excited utterances.

803.2.010 This rule has three requirements: (1) there must be a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made soon enough after the event so that the declarant does not have time to fabricate.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 21–23 (2016) (state intended to use 31-second cell-phone video recording of fight; defendant contended video contained multiple levels of hearsay, including conduct and people making statements heard on video; court noted that, to extent persons could be heard making statements, those would qualify as present sense impressions or excited utterances).

State v. Gulley, 240 Ariz. 580, 382 P.3d 795, ¶¶ 17–19 (Ct. App. 2016) (defendant contended S.W.'s statements were hearsay; court noted defendant's assault on S.W.'s mother startled S.W., that S.W. was extremely tense and hyper when he described incident, and only 5 to 10 minutes elapsed between events and S.W.'s statement, thus trial court properly found S.W.'s statements were excited utterances). **(PR pending.)**

ARTICLE 9. AUTHENTICATION AND IDENTIFICATION

Rule 901(b)(1). Authenticating and Identifying Evidence — Testimony of witness with knowledge.

901.b.1.030 A party may establish the condition precedent for the admission of evidence either by chain of custody or identification testimony.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 24–26 (2016) (state intended to use 31-second cell-phone video recording of fight; defendant contended state could not show chain of custody for video; court noted that state could have live witness testify whether contents of video fairly and accurately depicted events perceived by witness, thus chain-of-custody testimony was not necessary).

ARTICLE 10. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1002. Requirement of the Original.

1002.010 The rule requiring production of the original applies only when a party seeks to prove the contents of a writing, recording, or photograph without producing the writing, recording, or photograph itself.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 18–20 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds of recording; court noted state was not seeking to prove contents of video, and was instead intending to use video to illustrate live testimony from witness, thus Rule 1002 did not apply).

1002.020 The rule does not require the production of an original writing, recording, or photograph to prove an event that existed independently of its description in such writing, recording, or photograph.

State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939, ¶¶ 19–20 (2016) (witness used cell phone to record fight, cropped first 4½ minutes of recording, and saved remaining 31 seconds of recording; court noted state was not seeking to prove contents of video, and was instead intending to use video to illustrate live testimony from witness, thus Rule 1002 did not apply).

U.S. Const. amend. 4 Search and seizure—Legitimate expectation of privacy.

us.a4.ss.xp.010 An individual does not have automatic standing to challenge a search; an individual must have a legitimate expectation of privacy in the searched area before that interest will be protected by the Fourth Amendment, and there are two factors that determine whether the person has a legitimate expectation of privacy, the **first** of which is whether the individual, by conduct, has exhibited an actual (subjective) expectation of privacy.

State v. Jean, 239 Ariz. 495, 372 P.3d 1019, ¶¶ 11–20 (Ct. App. 2016) (officers placed GPS device on truck without warrant; officers stopped truck while owner was driving; defendant was in sleeper berth and claimed he was simply driver-in-training; search of truck revealed 2,140 pounds of marijuana; court held there was no evidence defendant was ever bailee of truck and therefore did not have standing to challenge placement of GPS device on truck). **(PR pending.)**

us.a4.ss.xp.050 An overnight guest has a legitimate expectation of privacy in the host's home.

State v. Peoples, 240 Ariz. 244, 378 P.3d 421, ¶¶ 17–25 (2016) (defendant had sex with victim (his girlfriend) in her apartment and left his cell phone in bathroom; next morning, victim's daughter found victim dead and called 9-1-1; when paramedics arrived, defendant left apartment; when Officer Mott searched apartment, he found cell phone and assumed it belonged to victim; Mott was able to access cell phone and found video on it of defendant and victim having sex; defendant returned to apartment and asked officer for his cell phone, but no one ever told Mott of that request; after viewing video, Mott detained defendant, gave his *Miranda* warnings, and questioned him about video; court held defendant had reasonable expectation of privacy as overnight guest in apartment, which did not terminate when victim died, and had reasonable expectation of privacy in cell phone even though it was not pass-code protected).

us.a4.ss.xp.060 A driver of a rental vehicle, driving with the renter's permission but not authorized by the rental agreement, is not *per se* without standing to challenge a search of the vehicle.

State v. Wasbotten, 239 Ariz. 492, 372 P.3d 1016, ¶¶ 6–8 (Ct. App. 2016) (Daniels rented truck and defendant was passenger; Daniels stopped truck and they switched places; after defendant failed to stop at stop sign, officers stopped truck and searched it, finding drugs; court held that, because Daniels gave defendant permission to drive truck, defendant had standing to challenge search).

U.S. Const. amend. 4 Search and seizure—Investigative stop and reasonable suspicion.

us.a4.ss.is.020 An officer may stop and detain a person for investigatory purposes if the totality of the circumstances gives the officer a reasonable, articulable suspicion that a particular person has committed, was committing, or was about to commit a crime or a traffic violation.

State v. Gutierrez, 240 Ariz. 460, 381 P.3d 254, ¶¶ 5–10 (Ct. App. 2016) (as officer followed defendant's vehicle, he saw defendant twice apply brakes for no apparent reason and saw vehicle's right tires twice swerve across white fog line, and therefore stopped vehicle; court concluded officer did not stop defendant for violating A.R.S. § 28–729(1) or for swerving over fog line just once, but instead based stop on totality of driver's conduct, which trial court demonstrated reasonable likelihood that driver might be impaired).

State v. Huez, 240 Ariz. 406, 380 P.3d 103, ¶¶ 2–14 (Ct. App. 2016) (defendant was riding his bicycle on raised dirt area adjacent to left side of roadway; although defendant was riding where sidewalk would be if there was one, there was no sidewalk, so defendant did not violate statute prohibiting riding on sidewalk; because dirt area did not meet definition of roadway, defendant was not riding on roadway; because defendant did not violate any traffic law, officer did not have reasonable suspicion to stop him).

State v. Ruiz, 239 Ariz. 379, 372 P.3d 323, ¶¶ 6–10 (Ct. App. 2016) (armed robbery had just occurred; robbers' getaway vehicle crashed, and they ran into desert; while search was ongoing, truck driver told detective person had approached him and asked for ride; detective entered truck stop and found defendant, who matched description of person; defendant was breathing heavily, his hands were shaking, and he looked disheveled; court held this provided reasonable suspicion to detain and question defendant and have one-person show-up with truck driver).

us.a4.ss.is.030 If an officer has reasonable suspicion to frisk a person, that does not necessarily give the officer the right to frisk any of the person's companions; in order to do so, the officer must have additional justification.

State v. Primous, 239 Ariz. 394, 372 P.3d 338, ¶¶ 9–14 (Ct. App. 2016) (officers were looking for person who had outstanding warrants; area was apartment complex in neighborhood known for violent crimes and that person frequented area, carried weapons, and sold drugs and weapons; officers approached group of four individuals including defendant, who did not match description of person for whom officer were looking; one member of group ran, and officers began frisking others, finding drugs on one person and then finding drugs on defendant; court held officers initially did not have reasonable suspicion to frisk defendant, but did so once one person ran and they found drugs on another) **(review pending)**.

us.a4.ss.is.070 Reasonable suspicion may be based on either a mistake of law or a mistake of fact as long as that mistake is objectively reasonable.

State v. Huez, 240 Ariz. 406, 380 P.3d 103, ¶¶ 15–18 (Ct. App. 2016) (defendant was riding his bicycle on raised dirt area adjacent to left side of roadway; although defendant was riding where sidewalk would be if there was one, there was no sidewalk, so defendant did not violate statute prohibiting riding on sidewalk; because dirt area did not meet definition of roadway, defendant was not riding on roadway; because defendant did not violate any traffic law, and because officer's mistake of law was not reasonable, trial court should have suppressed evidence).

State v. Stoll, 239 Ariz. 292, 370 P.3d 1130, ¶¶ 13–12 (Ct. App. 2016) (officer stopped defendant's vehicle because white license plate light was visible from rear of vehicle; court noted statute provided only that license plate light must be white and that nothing precluded that light from being visible from the rear, and held that officer's mistake of law was not reasonable, thus suppression was proper).

us.a4.ss.is.170 If an officer has reasonable basis to conduct an investigatory stop, the officer may detain the suspect for a reasonable time, which is the amount of time necessary to confirm or dispel their suspicions; if the officer detains the suspect longer than is reasonable, it will turn into an arrest, which requires probable cause.

State v. Kjolsrud, 239 Ariz. 319, 371 P.3d 647, ¶¶ 9–17 (Ct. App. 2016) (officer lawfully stopped vehicle because license plate was not illuminated; officer discovered defendant had outstanding non-extraditable warrant and remembered defendant had been previously involved in drug case; officer held defendant there for 10 minutes while officer with dog arrived; court held that, once officer had made stop and completed records check, justification for stop ended, and because officer had no further justification for detaining defendant, detention was unlawful, the trial court correctly granted motion to suppress).

U.S. Const. amend. 4 Search and seizure—Arrest.

us.a4.ss.a.030 A defendant is in custody when his or her liberty of movement is interrupted and restricted by the police, and whether such restriction has occurred is determined by an objective evaluation of the evidence and not by the subjective belief of the parties.

State v. Snyder, 240 Ariz. 551, 382 P.3d 109, ¶¶ 9–13 (Ct. App. 2016) (defendant was thought to be shoplifting, and was detained by store personnel, placed in handcuffs, and kept in security to await police; when officer arrived, he gave defendant *Miranda* warnings and questioned him about incident, and then replaced handcuffs with his own; court held trial court correctly concluded defendant had been placed under arrest).

U.S. Const. amend. 4 Search and seizure—Arrest—Warrant—Probable cause.

us.a4.ss.a.pc.010 An officer has probable cause to conduct a search if a reasonably prudent person, based upon facts known by the officer, would be justified in concluding the items sought are connected with criminal activity and that they would be found at the place to be searched.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 30–34 (2016) (defendant contended third search warrant lacked probable cause because it contained no new information that was not already covered in first two warrants; court disagreed and identified new information supporting third search warrant).

U.S. Const. amend. 4 Search and seizure—Fruits of illegal search.

us.a4.ss.fis.210 If the police have conducted an illegal search, the evidentiary fruits of that search may nonetheless be admissible if the police inevitably would have discovered the evidence by lawful means (**inevitable discovery**).

State v. Snyder, 240 Ariz. 551, 382 P.3d 109, ¶¶ 23–31 (Ct. App. 2016) (defendant was thought to be shoplifting, and ultimately placed under arrest; officer then searched his backpack; because defendant was in handcuffs and backpack was in another room, backpack was not in defendant's immediate control when he was arrested, thus search was not valid search incident to arrest; because defendant was arrested for misdemeanor, it was within officer's discretion to take him to jail or release him, thus it was not inevitable that defendant's property would have been subjected to inventory search, so no inevitable discovery).

us.a4.ss.fis.310 If the police have conducted an illegal search, the evidentiary fruits of that search may nonetheless be admissible if the taint of illegal conduct is sufficient attenuated from the subsequent search to avoid the exclusionary rule, and for this, the court will examine three factors: (1) the time elapsed between the unlawful police conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct (**attenuated causal connection**).

State v. Huez, 240 Ariz. 406, 380 P.3d 103, ¶¶ 19–29 (Ct. App. 2016) (defendant was riding his bicycle on raised dirt area adjacent to left side of roadway; court concluded defendant did not violate any traffic law, thus officer did not have reasonable suspicion to stop defendant; after discussing three factors, court concluded record presented discovery of evidence was too attenuated from unlawful stop to justify exclusion; but because state did not argue attenuation to trial court, court remanded for new evidentiary hearing at parties may introduce evidence concerning attenuation).

U.S. Const. amend. 4 Search and seizure—Plain view, smell, or feel.

us.a4.ss.pvsf.020 Because the Arizona Medical Marijuana Act (AMMA) does not decriminalize possession or use of marijuana, and instead only provides immunity for possession or use of marijuana consistent with the immunity provisions of the AMMA, possession or use of marijuana remains a crime under Arizona law, thus the plain smell of marijuana remains sufficient to establish probable cause for issuance of a search warrant or a warrantless search in appropriate circumstances.

State v. Cheatham, 240 Ariz. 1, 375 P.3d 66, ¶¶ 1, 7–13 (2016) (officer stopped defendant's vehicle because it appeared to have window tint that was too dark; when officer spoke to defendant, he noticed strong odor of burnt marijuana from inside vehicle; officer searched vehicle and found marijuana and paraphernalia; trial court denied motion to suppress finding probable cause based on "plain smell" doctrine; court held trial court did not err in denying motion to suppress).

State v. Sisco, 239 Ariz. 532, 373 P.3d 549, ¶¶ 1–3, 13–26 (2016) (officers smelled overpowering odor of marijuana from particular warehouse and obtained search warrant, but found no marijuana; officers applied for second warrant for nearby building, saying they had narrowed down source of odor; officer found dozens of marijuana plants and growing equipment; court held odor of marijuana was sufficient to establish probable cause).

U.S. Const. amend. 4 Search and seizure—Inventory search.

us.a4.ss.iv.010 An inventory search is valid if: (1) law enforcement officials have lawful possession or custody of vehicle; and (2) they conduct the inventory search in good faith and not as a subterfuge for a warrantless search.

State v. Wasbotten, 239 Ariz. 492, 372 P.3d 1016, ¶¶ 9–10 (Ct. App. 2016) (Daniels rented truck; officer saw Daniels drive truck with defendant as passenger; Daniels stopped truck and switch places with defendant; after defendant failed to stop at stop sign, officers stopped truck and discovered Daniels had suspended license; officer arrested Daniels, impounded truck, searched it, and found drugs; court held that, because officer saw Daniels driving truck, officer had authority to impound and search truck).

U.S. Const. amend. 4 Search and seizure—Search incident to an arrest.

us.a4.ss.ar.050 Because a person arrested might use a weapon or destroy evidence, an officer may search the area within the person's immediate control, but may not search area outside of the person's immediate control.

State v. Snyder, 240 Ariz. 551, 382 P.3d 109, ¶¶ 14–22 (Ct. App. 2016) (defendant was thought to be shoplifting, and ultimately placed under arrest; officer then searched his backpack; because defendant was in handcuffs and backpack was in another room, backpack was not in defendant's immediate control when he was arrested, thus search was not valid search incident to arrest).

U.S. Const. amend. 4 Search and seizure—Search of cell phone.

us.a4.ss.cp.010 A person has a reasonable expectation of privacy in the person's cell phone whether or not the cell phone has a pass code.

State v. Peoples, 240 Ariz. 244, 378 P.3d 421, ¶¶ 7–25 (2016) (defendant had sex with victim (his girlfriend) in her apartment and left his cell phone in bathroom; next morning, victim's daughter found victim dead and called 9-1-1; when paramedics arrived, defendant left apartment; when Officer Mott searched apartment, he found cell phone and assumed it belonged to victim; Mott was able to access cell phone and found video on it of defendant and victim having sex; defendant returned to apartment and asked officer for his cell phone, but no one ever told Mott of that request; after viewing video, Mott detained defendant, gave his *Miranda* warnings, and questioned him about video; court held defendant had reasonable expectation of privacy as overnight guest in apartment, which did not terminate when victim died, and had reasonable expectation of privacy in cell phone even though it was not pass-code protected).

U.S. Const. amend. 4 Search and seizure—Search of a person on probation or parole.

us.a4.ss.pop.010 As long as the conditions of release authorize such a search, a warrantless search of a person on **parole** may be conducted even without reasonable suspicion; for a person on **probation,** the search must be reasonable under the totality of the circumstances, which requires that the search be conducted by a probation officer in a proper manner and for a proper purpose in determining whether the probationer is complying with the probation obligations.

State v. Adair, 241 Ariz. 58, 383 P.3d 1132, ¶¶ 13–32 (2016) (confidential informant told police that defendant, who was on probation, was selling crack cocaine; over next few months, informant provided police with additional information; police relayed that information to defendant's probation officer, who conducted warrantless search; trial court granted defendant's motion to suppress ruling that search had to be supported by reasonable suspicion; court reversed, held search had to be reasonable under the totality of the circumstances).

U.S. Const. amend. 4 Search and seizure—Consent.

us.a4.ss.cs.010 An officer may search without a warrant if the suspect voluntarily consents, which will be determined by considering the totality of the circumstances.

State v. Becerra, 239 Ariz. 90, 366 P.3d 567, ¶¶ 1–23 (Ct. App. 2016) (officer stopped defendant's vehicle because of cracked windshield; officer asked defendant if she would consent to search, and she agreed; officer retrieved his K–9, which alerted to purse on driver's seat; court held reasonable person would not be surprised or find any novelty in officer's use of K–9; moreover, once defendant saw officer using K–9, defendant could have withdrawn consent).

us.a4.ss.cs.020 Consent may not be deemed to be given freely and voluntarily if the subject of the search merely acquiesces to a claim of lawful authority.

State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627, ¶¶ 1–2, , 22–23 (2016) (because officer told defendant Arizona law required him to take BAC test, defendant consent was not voluntary; because officer's language was consistent with language in Arizona cases in effect at time of search, court did not apply exclusionary rule and thus did not preclude evidence of BAC).

State v. Navarro, 241 Ariz. 19, 382 P.3d 1234, ¶¶ 2–4 (Ct. App. 2016) (defendant contended her consent to BAC test was involuntary; because defendant submitted to breath test, and because United States Supreme Court determined warrantless breath test is allowed as search incident to lawful DUI arrest, court did not have to address issue of nature of consent given).

us.a4.ss.cs.130 When a suspect consents to a search, unless the suspect places some limits on the scope of the search, there is no implicit limit to the scope of the search.

State v. Becerra, 239 Ariz. 90, 366 P.3d 567, ¶¶ 1–23 (Ct. App. 2016) (officer stopped defendant's vehicle because of cracked windshield; officer asked defendant if she would consent to search, and she agreed; officer retrieved his K–9, which alerted to purse on driver's seat; court held reasonable person would not be surprised or find any novelty in officer's use of K–9; moreover, once defendant saw officer using K–9, defendant could have withdrawn consent).

U.S. Const. amend. 4 Search and seizure—Exclusionary rule and its application.

us.a4.ss.exap.020 The good-faith exception to the exclusionary rule does not apply when the police conduct is not objectively reasonable.

State v. Peoples, 240 Ariz. 244, 378 P.3d 421, ¶¶ 26–25 (2016) (defendant had sex with victim (his girlfriend) in her apartment and left his cell phone in bathroom; next morning, victim's daughter found victim dead and called 9-1-1; when paramedics arrived, defendant left apartment; when Officer Mott searched apartment, he found cell phone and assumed it belonged to victim; Mott was able to access cell phone and found video on it of defendant and victim having sex; defendant returned to apartment and asked officer for his cell phone, but no one ever told Mott of that request; after viewing video, Mott detained defendant, gave his *Miranda* warnings, and questioned him about video; court held Mott did not have good-faith belief that cell phone belonged to victim, thus good-faith exception did not apply).

us.a4.ss.exap.030 If the police conduct a search in compliance with binding precedent that is later overruled, because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at high cost to both the truth and the public safety, searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627, ¶¶ 31–35 (2016) (because officer told defendant Arizona law required him to take BAC test, defendant consent was not voluntary; because officer's language was consistent with language in Arizona cases in effect at time of search, court did not apply exclusionary rule and thus did not preclude evidence of BAC).

State v. Kjolsrud, 239 Ariz. 319, 371 P.3d 647, ¶¶ 18–25 (Ct. App. 2016) (officer lawfully stopped vehicle because license plate was not illuminated; officer discovered defendant had outstanding non-extraditable warrant and remembered defendant had been previously involved in drug case; officer held defendant there for 10 minutes while officer with dog arrived; court held that, although United States Supreme Court decided *Rodriguez v. United States,* 135 S. Ct. 1609 (2015), after the stop in question, the law in this area was not sufficiently settled to excuse officer's conduct, thus court would not apply *Davis v. United States,* 564 U.S. 229 (2011)).

us.a4.ss.exap.040 If the state does claim at trial that the officer acted in conformity with the law as it existed at the time of the search, the state will be deemed to have waived that issue on appeal.

Brown v. McClennen, 239 Ariz. 521, 373 P.3d 538, ¶ 16 (2016) (officer told defendant that Arizona law required him to take BAC test; although this was consistent with language in Arizona cases in effect at time of search, because state did not raise that issue until oral argument on appeal, state waived that issue).

U.S. Const. amend. 5 Double jeopardy.

us.a5.dj.040 The guarantee against double jeopardy protects against a second prosecution for the same offense after conviction or acquittal, even when the acquittal was erroneous.

State v. Ruiz, 239 Ariz. 379, 372 P.3d 323, ¶¶ 11–16 (Ct. App. 2016) (defendant moved for judgment of acquittal; trial court stated it was going to dismiss robbery counts; state argued it would amend indictment to charge attempted robbery; trial court allowed amendment and denied Rule 20 motion; trial court's minute entry stated it had granted motion for judgment of acquittal, but then said it was reversing prior ruling; court held conviction on attempted robbery counts violated double jeopardy).

U.S. Const. amend. 5 Self-incrimination—Voluntariness.

us.a5.si.vol.080 In order for a confession to be involuntary within the meaning of the Due Process Clause, the officers must have exercised **coercive pressure** that was not dispelled; if the totality of the circumstances show the police did not engage in improper conduct that overwhelmed the defendant, or that their conduct did not cause the defendant to give a confession that the defendant otherwise did not want to give, the confession will be considered **voluntary.**

State v. Maciel, 240 Ariz. 46, 375 P.3d 938, ¶¶ 16–29 (2016) (person observed defendant seated next to vacant building with broken window; when officer arrived, defendant denied any knowledge of removal of board from window; officer asked defendant to sit in patrol car, and when another officer arrived, asked defendant to sit on curb next to building; person from building next door told officers board had been in place over window 3 days earlier; officer again asked defendant about window, and defendant said he had removed board and entered building to look for money; court held defendant was not in custody; court further noted defendant was not questioned in isolation or unfamiliar surroundings and was not "cut off" from the outside world, and officers did not unreasonably delay their investigation; court concluded objective circumstances did not present "inherently coercive pressures" comparable to station house questioning).

U.S. Const. amend. 5 Self-incrimination—*Miranda.*

us.a5.si.mir.050 If the suspect is not in custody, officers are not required to give *Miranda* warnings for questions as part of an investigation or to determine whether a crime is or was being committed.

State v. Maciel, 240 Ariz. 46, 375 P.3d 938, ¶¶ 1–29 (2016) (person observed defendant seated next to vacant building with broken window; when officer arrived, defendant denied any knowledge of removal of board from window; officer asked defendant to sit in patrol car, and when another officer arrived, asked defendant to sit on curb next to building; person from building next door told officers board had been in place over window 3 days earlier; officer again asked defendant about window, and defendant said he had removed board and entered building to look for money; court held defendant was not in custody, and officers were asking questions to determine whether crime had been committed).

us.a5.si.mir.085 *Miranda* warnings are required only when the person is subjected to custodial interrogation, and whether a person is in custody for *Miranda* purposes depends on whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest; in making this determination, courts have considered three factors: (1) the site of the questioning; (2) the presence of objective indicia of arrest; and (3) the length and form of the interrogation.

State v. Maciel, 240 Ariz. 46, 375 P.3d 938, ¶¶ 2–15 (2016) (person observed defendant seated next to vacant building with broken window; when officer arrived, defendant denied any knowledge of removal of board from window; officer asked defendant to sit in patrol car, and when another officer arrived, asked defendant to sit on curb next to building; person from building next door told officers board had been in place over window 3 days earlier; officer again asked defendant about window, and defendant said he had removed board and entered building to look for money; court held defendant was not in custody, and officers were asking questions to determine whether crime had been committed).

U.S. Const. amend. 6 Notice of charges.

us.a6.nt.010 The Sixth Amendment grants a defendant the right to notice of the nature and cause of the accusations and a copy of the charging document.

State v. Neese, 239 Ariz. 84, 366 P.3d 561, ¶ 14 (Ct. App. 2016) (in 1999, police determined DNA from several residential burglaries and thefts shared same genetic markers; on March 15, 2005, State filed indictment charging John Doe I and listing genetic markers; in May 2011, State determined DNA sample from defendant matched DNA profile and filed amended indictment substituting defendant's name for John Doe I; court held indictment sufficiently notified defendant of the charges).

U.S. Const. amend. 6 Speedy trial.

us.a6.st.070 In determining whether a delay violated the defendant's right to a speedy trial, the trial court must consider four factors, the **fourth** of which is the prejudice caused to the defendant.

State v. Neese, 239 Ariz. 84, 366 P.3d 561, ¶¶ 18–20 (Ct. App. 2016) (in 1999, police determined DNA from several residential burglaries and thefts shared same genetic markers; on March 15, 2005, State filed indictment charging John Doe I and listing genetic markers; in May 2011, State determined DNA sample from defendant matched DNA profile and filed amended indictment substituting defendant's name for John Doe I; defendant failed to establish how 6-year delay from March 2005 to May 2011 prevented him from obtaining exculpatory evidence).

U.S. Const. amend. 6 Confrontation and cross-examination.

us.a6.cf.010 The Sixth Amendment gives the defendant the right to confront and cross-examine adverse witnesses.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 52–53 (2016) (defendant contended trial court's ruling prohibiting him from observing state's DNA testing precluded him from conducting meaningful cross-examination of state's expert witnesses and presenting complete defense; court noted defendant had hired his own experts who could have testified at trial and that his attorney did cross-examine state's experts at length, thus no violation of defendant's rights).

us.a6.cf.020 The Sixth Amendment gives the defendant the right of confrontation, which has been interpreted to mean a face-to-face confrontation with witnesses who testify, and that right may be abridged only if the state shows the following: (1) the denial of face-to-face confrontation is necessary to further an important public policy; (2) the reliability of the testimony is otherwise assured; and (3) there is a case-specific showing of necessity for the accommodation.

State ex rel. Montgomery v. Kemp (Davis), 239 Ariz. 332, 371 P.3d 660, ¶¶ 13–24 (Ct. App. 2016) (state alleged defendant kidnapped and sexually assaulted then 20-year-old victim in 2003; numerous experts testified victim would suffer extreme mental and physical distress if confronted face-to-face with defendant; out-of-state judge where victim resided found victim was material and necessary witness, but that she would experience undue hardship in form of physical and psychological harm by being forced to testify in same room with defendant; court held state made sufficient showing and that use of two-way video testimony would satisfy defendant's confrontation rights).

us.a6.cf.030 A defendant who has been allowed self-representation does not have the absolute right to cross-examine the witnesses personally, instead, the trial court may impose reasonable limitations if the state shows by clear and convincing evidence that such cross-examination will injure the physical or psychological well-being of the witness.

State ex rel. Montgomery v. Padilla (Simcox), 239 Ariz. 314, 371 P.3d 642, ¶¶ 5–11 (Ct. App. 2016) (court held trial court erred in "concluding *any* restriction of [defendant's] right to personally cross-examine witness would be 'a violation of constitutional proportion' and reversible error"; court remanded so trial court could determine whether state has presented clear and convincing evidence of individualized and case-specific need for accommodation for each minor victim witness).

U.S. Const. amend. 6 Counsel—Pre-trial and trial.

us.a6.cs.tr.010 The Sixth Amendment gives the defendant the right to counsel at all critical stages of the proceedings, and the right to self-representation.

State v. Koepke, 240 Ariz. 188, 377 P.3d 385, ¶¶ 1–10 (Ct. App. 2016) (defendant was represented by attorney from public defender's office and law student; defendant had not, however, given written consent to law student's participation, as required by Rule 38(d) of the Arizona Supreme Court; court held defendant was not denied constitutional right to counsel).

us.a6.cs.tr.050 The Sixth Amendment gives the defendant the right to counsel, but it does not give the defendant the right to select a particular appointed attorney, and does not guarantee a meaningful relationship between the defendant and the attorney.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 68–85 (2016) (defendant contended he was effectively denied his right to counsel because trial court failed to address sufficiently what he contended was irreconcilable conflict and lack of communication between him and his attorneys; court held trial court made sufficient inquire into request for new counsel and regularly observed interaction between defendant and his attorneys, thus trial court did not deprive defendant of his right to counsel).

us.a6.cs.tr.060 The trial court should appoint new counsel when it determines either that a genuine irreconcilable conflict exists between the defendant and the attorney, or there is a total breakdown in communications between the defendant and the attorney.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 68–85 (2016) (defendant contended he was effectively denied his right to counsel because trial court failed to address sufficiently what he contended was irreconcilable conflict and lack of communication between him and his attorneys; court held trial court made sufficient inquire into request for new counsel and regularly observed interaction between defendant and his attorneys, thus trial court did not deprive defendant of his right to counsel).

U.S. Const. amend. 6 Counsel—Sentencing.

us.a6.cs.sn.010 The Sixth Amendment gives the defendant the right to counsel at all critical stages of the proceedings, which includes sentencing.

State v. Gunches, 240 Ariz. 198, 377 P.3d 993, ¶¶ 5–14 (2016) (court rejected defendant's contention that penalty phase of capital case was not "criminal prosecution" and thus rejected defendant's contention that trial court should not have allowed him to represent himself).

U.S. Const. amend. 6 Counsel—Ineffective assistance of counsel; Standards.

us.a6.cs.iac.001 To establish a claim of ineffective assistance of counsel, the defendant must show counsel's performance was deficient or not reasonable under prevailing professional norms, considering all the circumstances.

State v. Kolmann, 239 Ariz. 157, 367 P.3d 61, ¶¶ 14–16 (2016) (after 6 days of trial and after several hours of juror deliberations, juror told trial court, "I feel like I can't judge anybody" and she "was wrong" in not saying so earlier; after counsel declined to question juror further and more comments from juror, trial court excused her and replaced her with alternate juror; defendant contended his attorney provided ineffective assistance of counsel by not questioning juror further; court held that, because further questioning would have inquired into juror's though process, attorney was not ineffective for not questioning further).

U.S. Const. amend. 6 Trial by jury—*Apprendi/Blakely/Alleyne* issues.

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (June 24, 2004).

us.a6.jt.a/b.010 Other than the fact of a previous conviction, any fact that increases the penalty for a crime beyond the prescribed statutory **maximum** must be submitted to the jurors, and proved beyond a reasonable doubt.

State v. Leon, 240 Ariz. 492, 381 P.3d 286, ¶¶ 5–12 (Ct. App. 2016) (jurors expressly found property that was subject of theft had value of $25,000 or more, but less than $100,000; trial court ordered that defendant pay $195,670 in restitution; defendant contended that, because jurors found her guilty of theft under $100,000, trial court was precluded from ordering restitution in excess of that amount; court noted no court has applied *Apprendi* to restitution, and that even if *Apprendi* did apply, there is no statutory maximum to amount of restitution).

U.S. Const. amend. 8 Cruel and unusual punishment.

us.a8.cu.050 Comparative analysis within and between jurisdictions is appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.

State v. Florez, 241 Ariz. x0x, 384 P.3d 335, ¶¶ 21–25 (Ct. App. 2016) (defendant was convicted of three counts of child molestation (DCAC) and two counts of sexual conduct with minor (DCAC) for which he received concurrent and consecutive sentences totaling 36 years; court held sentencing schemes did not give rise to inference of gross disproportionality, thus it did not have to consider inter- and intra-jurisdictional comparisons).

U.S. Const. amend. 14 Due process—Collection, retention, and disclosure of evidence.

us.a14.dp.ev.020 When the state has failed to preserve evidence the exculpatory nature of which is unknown or is only potentially exculpatory, the defendant must show the state acted in bad faith in order to show a due process violation.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 35–51 (2016) (defendant contended trial court unconstitutionally deprived him opportunity to observe and participate in state's DNA testing, which consumed certain DNA samples; court noted nothing showed samples consumed were potentially exculpatory and nothing showed police acted in bad faith, thus defendant failed to show due process violation).

U.S. Const. amend. 14 Due process—Identification procedures.

us.a14.dp.id.050 To establish a due process violation, a defendant must establish three factors, the **second** of which is that the state bore sufficient responsibility for the suggestive pretrial identification to trigger due process protections.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 104–08, 134–35 (2016) (victim admitted seeing defendant's photograph and composite sketch on television multiple times; trial court found state was not responsible for media presentation of photograph and composite sketch).

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 136–41 (2016) (defendant contended in-court proceedings amounted to one-person showups; trial court found these were result of victims' constitutional right to be present at proceedings).

U.S. Const. amend. 14 Due process—Notice.

us.a14.dp.nt.010 Due process requires that the defendant be given notice of the specific charges, and a chance to be heard in a trial of the issues raised by that charge.

State v. Neese, 239 Ariz. 84, 366 P.3d 561, ¶ 14 (Ct. App. 2016) (in 1999, police determined DNA from several residential burglaries and thefts shared same genetic markers; on March 15, 2005, State filed indictment charging John Doe I and listing genetic markers; in May 2011, State determined DNA sample from defendant matched DNA profile and filed amended indictment substituting defendant's name for John Doe I; court held indictment sufficiently notified defendant of the charges).

April 10, 2017

Ariz. Const. art. 2, sec. 8. Right to privacy.

az.2.8.090 Under the Arizona Constitution, the police may search a person pursuant to a lawful arrest

State v. Navarro, 241 Ariz. 19, 382 P.3d 1234, ¶¶ 4–5 (Ct. App. 2016) (defendant contended her consent to BAC test was involuntary; because defendant submitted to breath test, and because United States Supreme Court determined warrantless breath test is allowed as search incident to lawful DUI arrest, court did not have to address issue of nature of consent given).

az.2.8.180 As long as the conditions of release authorize such a search, a warrantless search of a person on **parole** may be conducted even without reasonable suspicion; for a person on **probation,** the search must be reasonable under the totality of the circumstances, which requires that the search be conducted by a probation officer in a proper manner and for a proper purpose in determining whether the probationer is complying with the probation obligations.

State v. Adair, 241 Ariz. 58, 383 P.3d 1132, ¶ 24 (2016) (confidential informant told police that defendant, who was on probation, was selling crack cocaine; over next few months, informant provided police with additional information; police relayed that information to defendant's probation officer, who conducted warrantless search; trial court granted defendant's motion to suppress ruling that search had to be supported by reasonable suspicion; court reversed, held search had to be reasonable under the totality of the circumstances).

Ariz. Const. art. 2, sec. 22. Bailable offenses.

az.2.22.010 To the extent art. 2, § 22(A)(1) denies release to a defendant charged with certain enumerated offenses, it is unconstitutional; instead, a defendant may be denied release only if the state proves by clear and convincing evidence that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community.

Simpson v. Miller (State), 240 Ariz. 208, 377 P.3d 1003, ¶¶ 1, 9–23 (Ct. App. 2016) (defendants were charged with sexual conduct with minor under age of 15), *vac'd,* 2017WL526027 (Feb. 9, 2017).

Ariz. Const. art. 2, sec. 23. Trial by jury—Right to a jury.

az.2.23.rj.020 To determine whether the offense mandates a jury trial, the court should consider two things: **First,** under Article 2, section 23, whether the offense is an offense, or shares substantially similar elements as an offense, for which the defendant had a common-law right to a jury trial before statehood.

Kaniowsky v. Pima Cty. Con. Justice Ct., 239 Ariz. 326, 371 P.3d 654, ¶¶ 7–10 (Ct. App. 2016) (court concluded unlawful imprisonment pursuant to A.R.S. § 13–1303 is modern day analog to jury-eligible common law offense of false imprisonment).

Ariz. Const. art. 2, sec. 24. Rights of an accused—Trial by jury.

az.2.24.rj.010 To determine whether the offense mandates a jury trial, the court should consider two things: **First,** under Article 2, section 23, whether the offense is an offense, or shares substantially the similar elements as an offense, for which the defendant had a common-law right to a jury trial before statehood.

Kaniowsky v. Pima Cty. Con. Justice Ct., 239 Ariz. 326, 371 P.3d 654, ¶¶ 7–10 (Ct. App. 2016) (court concluded unlawful imprisonment pursuant to A.R.S. § 13–1303 is modern day analog to jury-eligible common law offense of false imprisonment).

April 10, 2017

13–103(B) Affirmative defenses—Definition.

.010 Arizona's Criminal Code establishes two categories of statutory defenses: (1) affirmative defenses; and (2) justification defenses; these categories of defenses are mutually exclusive; an affirmative defense is a defense that is offered and that attempts to excuse the criminal actions of the accused, while a justification defense describes conduct that, if not justified, would constitute an offense, but if justified, does not constitute criminal or wrongful conduct.

State v. Holle, 240 Ariz. 300, 379 P.3d 197, ¶¶ 21–23 (2016) (court held that, for sexual abuse and child molestation, lack of motivation by sexual interest is an affirmative defense that a defendant must prove, and thus state need not prove as element of those crimes that defendant's conduct was motivated by sexual interest).

13–105(22)(e) Definitions. (Historical prior felony conviction—Felonies committed in another jurisdiction.)

.010 Because A.R.S. § 13–703(m) refers to any felony, and because A.R.S. § 13–105 provides those definitions apply "unless the context otherwise requires," the 5-year limitation in A.R.S. § 13–105(22)(e) does not apply.

State v. Johnson, 240 Ariz. 402, 380 P.3d 99, ¶¶ 5–19 (Ct. App. 2016) (defendant contended his five Colorado convictions from 1989 to 2002 were outside 5-year time limit in § 13–105(22)(e)).

13–107(B) Time limitations—Period for prosecution.

.030 For limitation purposes, a criminal prosecution commences upon the filing of a "John Doe" indictment that identifies a defendant with a unique DNA profile.

State v. Neese, 239 Ariz. 84, 366 P.3d 561, ¶¶ 7–13 (Ct. App. 2016) (in 1999, police determined DNA from several residential burglaries and thefts shared same genetic markers; on March 15, 2005, State filed indictment charging John Doe I and listing genetic markers; in May 2011, State determined DNA sample from defendant matched DNA profile and filed amended indictment substituting defendant's name for John Doe I; court held this satisfied statute of limitations).

13–202(B) Construction of statutes with respect to culpability—Culpable mental states.

.020 If a statute defining an offense does not expressly prescribe a culpable mental state sufficient for commission of the offense, no culpable mental state is required, and the offense is one of strict liability, unless the proscribed conduct necessarily involves a culpable mental state.

State v. Burbey, 240 Ariz. 496, 381 P.3d 290, ¶¶ 2–14 (Ct. App. 2016) (A.R.S. § 13–3822, which requires registration of sex offenders, requires no mental state).

13–205 Affirmative defenses; justification; burden of proof.

.010 Arizona's Criminal Code establishes two categories of statutory defenses: (1) affirmative defenses; and (2) justification defenses; these categories of defenses are mutually exclusive; an affirmative defense is a defense that is offered and that attempts to excuse the criminal actions of the accused, while a justification defense describes conduct that, if not justified, would constitute an offense, but if justified, does not constitute criminal or wrongful conduct.

State v. Holle, 240 Ariz. 300, 379 P.3d 197, ¶¶ 21–23 (2016) (court held that, for sexual abuse and child molestation, lack of motivation by sexual interest is an affirmative defense that a defendant must prove, and thus state need not prove as element of those crimes that defendant's conduct was motivated by sexual interest).

13–206(B) Entrapment—Elements.

.020 It is an affirmative defense to a criminal charge that the person was entrapped, and in order to raise an entrapment defense, the person must affirmatively admit, by testimony or other evidence, the substantial elements of the offense charged.

State v. Gray, 239 Ariz. 475, 372 P.3d 999, ¶¶ 6–12 (2016) (court rejected defendant's contention (1) that his decision not to challenge state's evidence during trial was sufficient; (2) that his statement on audio recording was implicit admission; defendant must affirmatively admit elements of offense charged; trial court thus properly ruled defendant was not entitled to entrapment instruction).

13–501 Persons under 18 years of age; felony charging.

.070 Subsection (A)(4) requires a juvenile charged with committing armed robbery to be charged as an adult, and it does not matter that the juvenile used a simulated weapon.

McGuire v. Lee (State), 239 Ariz. 384, 372 P.3d 328, ¶¶ 8–21 (Ct. App. 2016) (court rejected juvenile's argument that armed robbery with toy gun was not a violent crime).

13–502(A) Insanity test; burden of proof; guilty except insane verdict—Standard.

.080 If a defendant raises a "guilty except insane" defense, the trial court must order disclosure of unredacted copies of any mental-health evaluations.

State v. Hegyi (Rasmussen), 240 Ariz. 251, 378 P.3d 428, ¶¶ 9–21 (Ct. App. 2016) (defendant hired his own psychologist, who questioned defendant's sanity; court then appointed another psychologist, who opined that defendant met guilty except insane criteria; defendant disclosed both reports to state, but redacted any statements defendant made to psychologist; state then moved to compel disclosure of defendant's redacted statements; court held defendant must provide unredacted copies of both (1) report of his retained psychologist and (2) report of court-appointed psychologist) **(review pending)**.

13–603(C) Authorized disposition of offenders—Restitution.

.090 This section imposed the affirmative duty upon the trial court to determine the amount of the victim's economic loss and to order restitution in that amount, and is not limited by the jurors' verdict.

State v. Leon, 240 Ariz. 492, 381 P.3d 286, ¶¶ 5–12 (Ct. App. 2016) (jurors expressly found property that was subject of theft had value of $25,000 or more, but less than $100,000; court held trial court did not err in ordering that defendant pay $195,670 in restitution).

13–703(M) Repetitive offenders; sentencing—Conviction from court outside this jurisdiction.

.010 In order for a conviction from court outside this jurisdiction to be considered a prior conviction, it must be an offense that was punished as a felony in that jurisdiction.

State v. Johnson, 240 Ariz. 402, 380 P.3d 99, ¶¶ 5–7 (Ct. App. 2016) (court noted legislature modified statute in 2012).

.020 Because this statute refers to any felony, and because A.R.S. § 13–105 provides those definitions apply "unless the context otherwise requires," the 5-year limitation in A.R.S. § 13–105(22)(e) does not apply.

State v. Johnson, 240 Ariz. 402, 380 P.3d 99, ¶¶ 5–19 (Ct. App. 2016) (defendant contended his five Colorado convictions from 1989 to 2002 were outside 5-year time limit in § 13–105(22)(e)).

13–705 Dangerous crimes against children.

.020 As long as preparatory conduct is in furtherance of one of the crimes identified as a DCAC pursuant to this statute, the defendant is guilty of a DCAC.

Wright v. Gates (State), 240 Ariz. 525, 382 P.3d 83, ¶¶ 7–17 (Ct. App. 2016) (in 1992, defendant was charged with solicitation to commit molestation of child pursuant to A.R.S. § 13–604.01 (renumbered as A.R.S. § 13–705, effective Jan. 1, 2009); court rejected defendant's argument that, because legislature had not specifically listed solicitation as DCAC, he was not guilty of DCAC offense).

13–707(B) Misdemeanor sentencing—Nature of the offense.

.010 This section provides that a person convicted of a misdemeanor with a prior conviction for the same misdemeanor shall be sentenced for the next higher class, which means that new misdemeanor conviction does not remain the same class and is instead the next higher class.

State v. Gulley, 240 Ariz. 580, 382 P.3d 795, ¶¶ 23–27 (Ct. App. 2016) (defendant was convicted of disorderly conduct with a prior conviction for disorderly conduct; court rejected defendant's contention that, although he was required to be sentenced for a class 6 felony, his disorderly conduct conviction remained a class 1 misdemeanor). **(PR pending.)**

.020 This section provides that a person convicted of a misdemeanor with a prior conviction for the same misdemeanor shall be sentenced for the next higher class, but that new misdemeanor conviction remains the same class and is not designated the next higher class.

State v. Ceasar, 241 Ariz. 66, 383 P.3d 1140, ¶¶ 4–10 (Ct. App. 2016) (defendant was convicted of disorderly conduct with a prior conviction for disorderly conduct; court accepted defendant's contention that, although he was required to be sentenced for a class 6 felony, his disorderly conduct conviction remained a class 1 misdemeanor).

13–707(C) Misdemeanor sentencing—Determination.

.010 If a person is convicted of a misdemeanor offense and the offense requires enhanced punishment because it is a second or subsequent offense, the court shall determine the existence of the previous conviction.

State v. Gulley, 240 Ariz. 580, 382 P.3d 795, ¶¶ 8–11 (Ct. App. 2016) (defendant was charged with disorderly conduct; defendant contended trial court erred in having jurors determine whether he had prior disorderly conduct conviction; because defendant agreed that prior conviction was element of charge that jurors had to determine, defendant invited any error). **(PR pending.)**

13–901(A) Probation—Conditions of probation.

.050 Section 13–901(A) requires the trial court to impose a probation service fee as a condition of probation, both supervised and unsupervised; imposing this fee for unsupervised probation is not unconstitutional.

State v. Panos, 239 Ariz. 116, 366 P.3d 1006, ¶¶ 1–14 (Ct. App. 2016) (defendant pled guilty to misdemeanor possession of marijuana and drug paraphernalia; trial court placed defendant on 9 months' unsupervised probation; defendant contended statute was unconstitutional because person convicted in superior court must pay service fee, while person convicted in justice or municipal could does not have to pay service fee).

13–902(C) Periods of probation—Extension of period of probation.

.010 If the defendant has violated a condition of probation that the defendant pay restitution, the trial court may extend the period of probation and may continue, modify, or add any conditions of probation, not just the conditions relating to restitution.

State v. Turner, 239 Ariz. 390, 372 P.3d 334, ¶¶ 2–12 (Ct. App. 2016) (defendant failed to pay restitution, so twice trial court extended period of probation; trial court subsequently revoked defendant's probation based on violation of condition that did not relate to restitution; court rejected defendant's argument that trial court had been limited to extending only those conditions that related to restitution).

.020 Before the trial court may make any material modification of the conditions of probation, the trial court must give the defendant notice and hold a hearing.

State v. Turner, 239 Ariz. 390, 372 P.3d 334, ¶¶ 13–16 (Ct. App. 2016) (defendant contended that, when trial court entered order that "probation term is extended for 5 years," that did not give him notice that trial court had also extended all conditions of probation; court noted that "term" might mean either a condition of probation or the period (duration) of probation; court concluded that, in context, use of "extended" made clear that trial court meant "term" to refer to period of time, rather than any conditions of probation, and that defendant's actions showed he understood that original conditions of probation remained in effect).

13–1105 First-degree murder—Felony murder.

.120 Although the felony of aggravated assault will not support a charge of felony murder, any of the other listed predicate felonies will, and they do not merge into the murder.

State v. Martinson, 240 Ariz. x0x, 384 P.3d 307, ¶¶ 13–26 (Ct. App. 2016) (state charged defendant with first degree felony murder and child abuse as result of death of defendant's son; court rejected defendant's contention that child abuse merged into felony murder, thus state was entitled to pursue theory that defendant committed predicate felony of child abuse with intent to kill child, not merely injure him, thus trial court's ruling was erroneous and dismissal should have been without prejudice).

.150 This section lists the following: (1) marijuana offense; (2) dangerous drug offense; and (3) narcotics offense; all followed by "that equal or exceed the statutory threshold amount for each offense or combination of offenses," which applies to all three drug offenses and not just the last-listed drug offense.

State v. Olague, 240 Ariz. 475, 381 P.3d 269, ¶¶ 10–15 (Ct. App. 2016) (court rejected defendant's argument that felony murder statute permitted selective prosecution because state could utilize marijuana offense involving any amount).

13–1401(A)(3) Definitions—Sexual offenses. (Sexual contact.)

.010 "Sexual contact" means any direct or indirect touching, fondling, or manipulating of any part of the genitals, anus, or female breast by any part of the body or by any object or causing a person to engage in such contact.

State v. Florez, 241 Ariz. x0x, 384 P.3d 335, ¶¶ 2–20 (Ct. App. 2016) (evidence that defendant rubbed his clothed penis against victim's clothed buttocks was sufficient under this definition).

13–1401(A)(4) Definitions—Sexual offenses. (Sexual intercourse.)

.010 "Sexual intercourse" means penetration into the penis, vulva, or anus by any part of the body or by any object or masturbatory contact with the penis or vulva.

State v. Florez, 241 Ariz. x0x, 384 P.3d 335, ¶¶ 2–20 (Ct. App. 2016) (evidence that defendant rubbed his clothed penis against victim's clothed buttocks was sufficient under this definition).

13–1401(A)(7)(b) Definitions—Sexual offenses. (Without consent—incapable of consent.)

.010 The phrase "incapable of consent by reason of . . . alcohol" is not unconstitutionally vague.

State v. Causbie, 241 Ariz. 173, 384 P.3d 1253, ¶¶ 14–25 (Ct. App. 2016) (victim was at party where she drank six shots of whiskey and mixed drink containing "three second pour" of whisky; victim did not feel safe driving, so she fell asleep on couch on her stomach; some time later, witness saw victim with her pants and underwear pulled down and her legs apart, and defendant kneeling beside couch and repeatedly "putting his hand up [victim's] vagina very roughly"; although witness could not tell whether victim awake or asleep, victim did not seem to be participating in any way, nor was she making any sounds; victim awoke to feeling of "a thrusting fist pain" or "pounding in [her] vagina area," and unsuccessfully tried to push defendant away; victim later discovered blood in her underwear and bruises on her inner thighs, and felt pelvic pain that lasted for about a week; court rejected defendant's contention that term "consent" is unconstitutionally vague, and his contention that phrase "incapable of consent by reason of . . . alcohol" is unconstitutionally vague).

13–1407(E) Defenses—Not motivated by a sexual interest.

.020 For sexual abuse and child molestation, the lack of motivation by a sexual interest is an affirmative defense that a defendant must prove, and thus the state need not prove as an element of those crimes that the defendant's conduct was motivated by a sexual interest.

State v. Holle, 240 Ariz. 300, 379 P.3d 197, ¶¶ 8–26, 50 (2016) (defendant's 11-year-old step-granddaughter told friend and then police that defendant had inappropriately touched and kissed her; defendant asked trial court to instruct jurors that state must prove beyond reasonable doubt sexual motivation as element of sexual abuse and child molestation charges; trial court refused and rules that defendant must prove lack of sexual motivation by preponderance of evidence).

.030 Treating lack of sexual motivation under § 13–1407(E) as an affirmative defense, which a defendant must prove, does not offend due process.

State v. Holle, 240 Ariz. 300, 379 P.3d 197, ¶ 40 (2016) (defendant's 11-year-old step-granddaughter told friend and then police that defendant had inappropriately touched and kissed her; defendant asked trial court to instruct jurors that state must prove beyond reasonable doubt sexual motivation as element of sexual abuse and child molestation charges; trial court refused and rules that defendant must prove lack of sexual motivation by preponderance of evidence).

13–1501(3) Definitions (criminal trespass and burglary)—Entry (Instrument).

.010 Entry means the intrusion of any part of an instrument inside the external boundaries of a structure or unit of real property; although the statute does not define "instrument," the term is generally understood to mean a tool or implement used to do or facilitate work.

State v. Decker, 239 Ariz. 29, 365 P.3d 954, ¶¶ 12–19 (Ct. App. 2016) (defendant fired gun at house; bullet entered house and hit victim, who died; court concluded bullet fired into structure qualified as instrument).

13–1505 Possession of burglary tools.

.010 This statute criminalizing possession of burglary tools only applies to tools a person intends to use as burglary tools, thus it is not unconstitutionally vague.

State v. Denson, 241 Ariz. 6, 382 P.3d 1221, ¶¶ 7–15 (Ct. App. 2016) (evidence showed defendant had committed burglary and then fled; when caught, defendant was in possession of items taken in burglary, and pair of gloves and flashlight, defendant was convicted of possession of burglary tools based on his possession of gloves and flashlight).

.020 Possession of burglary tools is just one crime, so it does not matter how many burglary tools the defendant is alleged to have possessed.

State v. O'Laughlin, 239 Ariz. 398, 372 P.3d 342, ¶¶ 4–14 (Ct. App. 2016) (defendant was charged with possession of burglary tools, "to wit: flashlight, knife, gloves"; on verdict form, trial court listed "flashlight, knife, and/or gloves"; defendant contended he was in effect charged with possessing "flashlight, knife, and gloves," thus indictment was duplicitous (duplicative), so jurors might not have been unanimous in finding him guilty; court held this was one crime that can be committed several ways, so it did not matter whether he possessed one, two, or three burglary tools).

13–1805(A)(1) Shoplifting—By removal.

.020 Because shoplifting under § 13–1805(A)(1) contains all the elements of organized retail theft under § 13–1819(A)(2), shoplifting is a lesser-included offense of organized retail theft.

State v. Cope, 241 Ariz. 323, 387 P.3d 746, ¶¶ 4–6 (Ct. App. 2016) (defendant was convicted of two counts of organized retail theft under § 13–1819(A)(1) and (A)(2), and one count of shoplifting under § 13–1805(A)(1); court vacated defendant's conviction for shoplifting).

13–1805(I) Shoplifting—Facilitated or aggravated shoplifting.

.030 A person who commits shoplifting and has been convicted within the past 5 years of two or more enumerated offenses (including juvenile adjudications) is guilty of a class 4 felony.

In re C.D., 240 Ariz. 239, 377 P.3d 1034, ¶¶ 1–11 (Ct. App. 2016) (juvenile had been previously adjudicated twice for committing shoplifting; court rejected juvenile's contention that statute did not apply to previous juvenile adjudications).

.040 Having been convicted within the past 5 years of two or more enumerated offenses is an element of the offense, thus the defendant is not entitled to a bifurcated trial.

State v. Lara, 240 Ariz. 327, 379 P.3d 224, ¶¶ 1–9 (Ct. App. 2016) (state alleged defendant had been convicted of shoplifting twice previously within past 5 years).

13–1819 Organized retail theft.

.030 Because organized retail theft under section (A)(1) requires an intent to resell or trade the merchandise for money or for other value, and because organized retail theft under section (A)(2) requires an intent to deprive and the use of an artifice, instrument, container, device, or other article to facilitate the removal of the merchandise, these subsections contain different elements, thus a conviction for both (A)(1) and (A)(2) does not violate double jeopardy.

State v. Cope, 241 Ariz. 323, 387 P.3d 746, ¶¶ 7–9 (Ct. App. 2016) (defendant was convicted of two counts of organized retail theft under § 13–1819(A)(1) and (A)(2), and one count of shoplifting under § 13–1805(A)(1); court affirmed both convictions for organized retail theft).

.040 Because shoplifting under § 13–1805(A)(1) contains all the elements of organized retail theft under § 13–1819(A)(2), shoplifting is a lesser-included offense of organized retail theft.

State v. Cope, 241 Ariz. 323, 387 P.3d 746, ¶¶ 4–6 (Ct. App. 2016) (defendant was convicted of two counts of organized retail theft under § 13–1819(A)(1) and (A)(2), and one count of shoplifting under § 13–1805(A)(1); court vacated defendant's conviction for shoplifting).

13–2508(A) Resisting arrest—Actions against peace officer.

.030 If there is a single uninterrupted event, resisting arrest is a single offense no matter how many officers are involved.

State v. Jurden, 239 Ariz. 526, 373 P.3d 543, ¶¶ 8, 17, 26 (2016) (two officers attempted to arrest defendant for criminal trespass, but he bit and kicked one officer and flailed and pulled his arms away from other officer; court held this was only single offense and vacated second conviction).

13–2904 Disorderly conduct.

.020 Although the statute provides six ways a person may commit disorderly conduct, it is a unitary offense.

State v. Gulley, 240 Ariz. 580, 382 P.3d 795, ¶¶ 13–16 (Ct. App. 2016) (defendant was charged with disorderly conduct under A.R.S. § 13–2904(A)(1); court rejected defendant's contention that jurors' determination that he was previously convicted of disorderly conduct under A.R.S. § 13–2904(A) was not sufficient to establish he had been convicted of "same misdemeanor" as required by A.R.S. § 13–707(B)). **(PR pending.)**

13–2907(B) False reporting—Expenses incurred.

.010 If the person is a juvenile adjudicated delinquent of false reporting, the court may order the juvenile to pay as restitution the expenses incurred both in responding to the emergency and in investigating the false report.

In re J.U., 241 Ariz. 156, 384 P.3d 839, ¶¶ 6–23 (Ct. App. 2016) (trial court adjudicated juvenile delinquent of false reporting; court held trial court properly ordered juvenile to pay as restitution expenses police department incurred both in responding to emergency and in investigating false report, but erred in ordering juvenile to pay for mileage incurred by officers to attend court hearings).

13–3102(A)(3) Misconduct involving weapons—Prohibited acts—Possessing prohibited weapons.

.010 Possession may be actual or constructive, which may be proved by direct or circumstantial evidence.

State v. Ingram, 239 Ariz. 228, 368 P.3d 936, ¶¶ 20–24 (Ct. App. 2016) (officers found loaded .40-caliber pistol in briefcase in master-bedroom closet; defendant said he had one like it, but did not know if that one was his and his was "in the closet"; in briefcase was prescription pill bottle with defendant's name and date 2 months prior to arrest, and officers found .40-caliber bullet in defendant's pocket; court held this was sufficient to prove possession of pistol).

13–3102(A)(8) Misconduct involving weapons—Prohibited acts—Using deadly weapon during commission of a felony.

.020 The allowable unit of prosecution for a violation of A.R.S. § 13–3102(A)(8) is each deadly weapon possessed during the commission of the underlying felony.

State v. Gutierrez, 240 Ariz. 460, 381 P.3d 254, ¶¶ 18–25 (Ct. App. 2016) (after stopping defendant's vehicle, officer found drugs and two handguns in vehicle; court held no double jeopardy violation occurred when defendant was convicted and sentenced on two counts of misconduct involving weapons).

13–3407(E) Possession, use, administration, acquisition, sale, manufacture or transportation of dangerous drugs—Methamphetamine.

.010 A person sentenced for a drug offense involving Methamphetamine shall be sentenced under A.R.S. § 13–712 and shall receive a "calendar year" or "flat time" sentence, with a presumptive sentence of 10 years that may be aggravated or mitigated up to 5 years.

State v. Gutierrez, 240 Ariz. 460, 381 P.3d 254, ¶¶ 35–38 (Ct. App. 2016) (defendant was convicted of transporting methamphetamine for sale; court held trial court did not err in imposing flat-time sentence).

13–3821(A) Persons required to register; procedure—Enumerated offenses.

.030 Requiring a person to register if convicted of certain crimes without a finding that the offense was sexually motivated does not deny equal protection or due process.

State v. Coleman, 241 Ariz. 190 , 385 P.3d 420, ¶¶ 2–23 (Ct. App. 2016) (defendant was convicted of unlawful imprisonment and aggravated assault of minor under 15 for victim age 3, but jurors did not find unlawful imprisonment was with sexual motivation).

13–3822 Notice of moving from place of residence or change of name or electronic information; forwarding of information; definitions.

.010 This statute requires a person to notify the sheriff within 72 hours of moving from the person's residence, and requires a person without a permanent residence to notify the sheriff every 90 days.

State v. Burbey, 240 Ariz. 496, 381 P.3d 290, ¶¶ 2–14 (Ct. App. 2016) (defendant resided in halfway house, but then moved out and became homeless; court held defendant was required to notify sheriff within 72 hours of moving out of halfway house, and rejected his contention that he only had to register every 90 days).

13–3961 Offenses not bailable; pre-conviction; exceptions.

.020 To the extent § 13–3961(A) denies release to a defendant charged with certain enumerated offenses, it is unconstitutional; instead, a defendant may be denied release only if the state proves by clear and convincing evidence that no condition or combination of conditions of release may be imposed that will reasonably assure the safety of the other person or the community.

Simpson v. Miller (State), 240 Ariz. 208, 377 P.3d 1003, ¶¶ 1, 9–23 (Ct. App. 2016) (defendants were charged with sexual conduct with minor under age of 15), *vac'd,* 241 Ariz. 341, 387 P.3d 1270 (2017).

13–3993 Examination of defendant pleading not guilty by reason of insanity; privilege inapplicable; reports.

.010 If a defendant raises a "guilty except insane" defense, the defendant waives the physician-patient privilege.

State v. Hegyi (Rasmussen), 240 Ariz. 251, 378 P.3d 428, ¶ 11 (Ct. App. 2016) (defendant hired his own psychologist, who questioned defendant's sanity; court then appointed another psychologist, who opined that defendant met guilty except insane criteria; defendant disclosed both reports to state, but redacted any statements defendant made to psychologist; state then moved to compel disclosure of defendant's redacted statements; court held defendant must provide unredacted copies of both (1) report of his retained psychologist and (2) report of court-appointed psychologist) **(review pending)**.

13–4032 Appeal by state—Right to appeal.

.030 When a matter originates in a lower court and the superior court rules on a petition for special action, if the state then appeals to the court of appeals, jurisdiction is pursuant to A.R.S. § 12–2101(A)(1) and not A.R.S. § 13–4032.

State v. Chopra, 241 Ariz. 353, 387 P.3d 1282, ¶¶ 5–8 (Ct. App. 2016) (court rejected defendant's claim that court of appeals did not have jurisdiction to review state's claim that superior court incorrectly ruled).

13–4033(A) Appeal by defendant—Grounds for appeal.

.010 This section allows a defendant to appeal from (1) a final judgment of conviction or verdict of guilty except insane, (2) an order denying a motion for a new trial; (3) an order after judgment affecting the substantial rights of the party; and (4) a sentence on the grounds that it is illegal or excessive.

State v. Martinson, 240 Ariz. x0x, 384 P.3d 307, ¶¶ 31–32 (Ct. App. 2016) (state appealed from trial court's order dismissing charges with prejudice; because that was not one of statutory grounds for a defendant's appeal, defendant had no right to file cross-appeal contending trial court erred by denying his motions for judgment of acquittal).

13–4253 Out of court testimony; televised; recorded.

.030 Although the accommodations described in this statute are statutorily triggered on motion of the prosecution, a trial court has considerable discretion to determine what procedures are appropriate in a particular case and thus may act on its own motion.

State ex rel. Montgomery v. Padilla (Simcox), 239 Ariz. 314, 371 P.3d 642, ¶¶ 12–14 (Ct. App. 2016) (court rejected defendant's contention that trial court abused its discretion by imposing closed-circuit television accommodation when no party had requested it).

28–729(1) Driving on roadways laned for traffic—Driving within a single lane.

.010 This section requires a person to drive a vehicle as nearly as practicable entirely within a single lane, thus a driver does not violate this section merely by allowing wheels on one side of a vehicle to pass over the line marking a lane and then returning to driving within the lane.

State v. Gutierrez, 240 Ariz. 460, 381 P.3d 254, ¶¶ 5–10 (Ct. App. 2016) (as officer followed defendant's vehicle, he saw defendant twice apply brakes for no apparent reason and saw vehicle's right tires twice swerve across white fog line, and therefore stopped vehicle; court concluded officer did not stop defendant for violating A.R.S. § 28–729(1) or for swerving over fog line just once, but instead based stop on totality of driver's conduct, which trial court demonstrated reasonable likelihood that driver might be impaired).

28–925(C) Tail lamps—License plate lamp.

.010 A motor vehicle shall be equipped with a lamp that illuminates the rear license plate with a white light so that the license plate is visible from a distance of 50 feet.

State v. Kjolsrud, 239 Ariz. 319, 371 P.3d 647, ¶¶ 2, 11 (Ct. App. 2016) (officer stopped defendant's vehicle because license plate was not illuminated; parties agreed initial traffic stop was reasonable).

28–931(C)(2) Lamps colors—License plate light.

.010 This statute provides that the light illuminating the license plate shall be white; nothing precludes that light from being visible from the rear of the vehicle.

State v. Stoll, 239 Ariz. 292, 370 P.3d 1130, ¶¶ 1, 8–12 (Ct. App. 2016) (officer stopped defendant's vehicle because white license plate light was visible from rear of vehicle; court noted statute provided only that license plate light must be white and that nothing precluded that light from being visible from rear of vehicle).

28–1321(A) Implied consent—Implied consent to submit to test.

.020 Informing a driver that "Arizona law requires you to submit to and successfully complete tests of breath, blood, or other bodily substance " makes any subsequent consent involuntary.

State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627, ¶ 24 (2016) (court noted statute provides person after arrest shall be requested to submit to BAC test, but does not require person to do so).

State v. Navarro, 241 Ariz. 19, 382 P.3d 1234, ¶¶ 2–4 (Ct. App. 2016) (defendant contended her consent to BAC test was involuntary; because defendant submitted to breath test, and because United States Supreme Court determined warrantless breath test is allowed as search incident to lawful DUI arrest, court did not have to address issue of nature of consent given).

28–1321(B) Implied consent—Refusal to submit to test.

.010 A person has the power, but not the right, to refuse to submit to a BAC test.

State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627, ¶ 24 (2016) (court noted statute provides person after arrest shall be requested to submit to BAC test, but does not require person to do so).

.020 Upon arresting a person for DUI, the officer should do the following: (1) ask the person whether the person will consent to a BAC test, and advise the person of the penalties set forth in § 28–1321(B)(1) and (2); (2) if the person expressly agrees and successfully completes the BAC test, the officer need not advise the person of the consequences of refusing; (3) if the person refused to consent or fails to complete the test successfully, advise the person of the consequences as set forth in § 28–1321(B); (4) again ask the person whether the person will consent to a BAC test; (5) if the person again refused to consent, the officer may not administer a test unless the officer obtains a warrant.

State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627, ¶ 29 (2016) (because officer told defendant Arizona law required him to take BAC test, defendant consent was not voluntary; because officer's language was consistent with language in Arizona cases in effect at time of search, court did not apply exclusionary rule and thus did not preclude evidence of BAC).

28–1321(C) Implied consent—Person dead, unconscious, or otherwise incapacitated.

.010 Blood may be taken from a dead, unconscious, or otherwise incapacitated person only if case-specific exigent circumstances exist.

State v. Havatone, 241 Ariz. 506, 389 P.3d 1251, ¶¶ 13–17 (2017) (defendant was conscious at scene of collision, but was airlifted to hospital in Las Vegas; defendant was unconscious at hospital; officer instructed Las Vegas officers to obtain blood sample; because state did not show any exigent circumstances, BAC results should have been suppressed).

.020 When police have probable cause to believe a suspect has committed a DUI, a nonconsensual blood draw is permissible if, under the totality of the circumstances, law enforcement officials reasonably determine they cannot obtain a warrant without a significant delay that would undermine the effectiveness of the testing.

State v. Havatone, 241 Ariz. 506, 389 P.3d 1251, ¶ 18 (2017) (because state did not show any exigent circumstances, BAC results should have been suppressed).

28–1323(A)(5) Admissibility of breath test or other records—Foundational requirements—Quality assurance records.

a.5.010 Under subsection (5), Quality Assurance Records are a necessary foundational predicate for admission of breath test results.

State v. Peraza, 239 Ariz. 140, 366 P.3d 1030, ¶¶ 25–35 (Ct. App. 2016) (instruction that periodic maintenance records provide prima facie evidence that device was in proper condition at time of test correctly states law and did not result in burden shifting).

28–1381(A)(3) Driving or actual physical control—Any illicit drug in the person's body.

.060 In order to prove a defendant guilty under § 28–1381(A)(3), the state must only prove the presence of a drug or metabolite in the person's body and does not have to prove the person was in fact impaired, thus the provision of the AMMA, A.R.S. § 36–2802(D), which provides immunity to being "under the influence of marijuana," does not immunize a medical marijuana cardholder from prosecution under § 28–1381(A)(3), but instead affords an affirmative defense if cardholder shows the marijuana or its metabolite was in a concentration insufficient to cause impairment.

Ishak v. McClennen, 241 Ariz. 364, 388 P.3d 1, ¶¶ 9–19 (Ct. App. 2016) (court held trial court erred in precluding evidence that defendant was medical marijuana cardholder; although state's expert testified sample of defendant's blood showed 26.9 ng/ml of THC, court held error was not harmless).

28–1383(A)(4) Driving without required ignition interlock device.

.010 This section prohibits driving a vehicle without a court-ordered ignition interlock device.

State v. James, 239 Ariz. 367, 372 P.3d 311, ¶ 6 (Ct. App. 2016) (court ordered defendant to install ignition interlock device on any vehicle once his driving privileges were reinstated; defendant's driving privileges had not been reinstated at time of offense, thus although defendant was driving without a valid license, he was not violating this ignition interlock device statute).

28–1388(E) Blood and breath tests; violation; classification; admissible evidence—Sample of blood, urine, or other bodily substance.

.010 To invoke the medical blood draw exception set forth in this section, the state must establish the following: (1) probable cause existed to believe the suspect was driving under the influence; (2) exigent circumstances made it impractical for law enforcement to obtain a warrant; (3) medical personnel drew the blood sample for medical reasons; and (4) the provision of medical services did not violate the suspect's right to direct his or her own medical treatment.

State v. Nissley, 241 Ariz. 327, 387 P.3d 1256, ¶¶ 10, 24 (2017) (court cites *State v. Cocio,* 147 Ariz. 277, 709 P.2d 1336 (1985)).

State v. Peltz, ___ Ariz. ___, ___ P.3d ___, ¶ 36 (Ct. App. Mar. 2, 2017) (defendant was injured in collision and transported to hospital; nurse informed officer that they would be drawing defendant's blood for medical purposes, and officer requested sample; officer testified that, based on his training as "combat life saver in the military," he was aware of possibility of "intravenous applications of fluids," which would "alter an individual's blood alcohol concentration" and "essentially destroy whatever evidence was available"; thus state met its burden of showing exigent circumstances).

.020 The natural dissipation of alcohol in the bloodstream in not a *per se* exigent circumstance; the state must establish exigency by showing that, under the circumstances specific to the case, it was impractical to obtain a warrant.

State v. Nissley, 241 Ariz. 327, 387 P.3d 1256, ¶¶ 11–12 (2017) (court disavows anything in *State v. Cocio*, 147 Ariz. 277, 286, 709 P.2d 1336, 1345 (1985), to the contrary).

.030 Before the state may use as evidence a portion of a blood, urine, or other sample taken for medical purposes, the state is required to prove that (1) the suspect expressly or impliedly consented to medical treatment or (2) medical personnel acted when the suspect was incapable of directing his or her own medical treatment.

State v. Nissley, 241 Ariz. 327, 387 P.3d 1256, ¶¶ 2, 20–24 (2017) (at 5:30 p.m., defendant collided head-on into oncoming vehicle, injuring four persons in vehicle and killing pedestrian; defendant was very hostile and combative with medical personnel; court stated that record did not conclusively establish whether defendant was able or competent to direct his own medical treatment and whether medical personnel acted against that right, and so remanded for trial court to apply appropriate standards and determine whether law enforcement personnel lawfully obtained blood sample).

28–3511 Removal and immobilization or impoundment of vehicle.

.020 The use of the phrase "is driving" requires the driving occur while the person's license is suspended or revoked, and does not require driving at the moment of the actual stop by the officer.

State v. Wasbotten, 239 Ariz. 492, 372 P.3d 1016, ¶¶ 9–10 (Ct. App. 2016) (officer saw Daniels drive truck with defendant as passenger; Daniels stopped truck and switch places with defendant; after defendant failed to stop at stop sign, officers stopped truck and discovered Daniels had suspended license; officer arrested Daniels, impounded truck, searched it, and found drugs; court held that, because officer saw Daniels driving truck, officer had authority to impound and search truck even though Daniels was not driving truck at time of stop).

36–2811(C) Arizona Medical Marijuana Act—Presumption of medical use of marijuana; protections; civil penalty—physician immunity.

.010 Does not provide immunity from prosecution for a physician making false statements.

State v. Gear, 239 Ariz. 343, 372 P.3d 287, ¶¶ 6–23 (2016) (despite never having done so, physician certified that he had reviewed patient's medical records from preceding 12 months; court held AMMA did not immunize physician from making false statements, thus trial court erred in dismissing forgery charges).

April 10, 2017

ARTICLE III. RIGHTS OF PARTIES.

RULE 6. ATTORNEYS, APPOINTMENT OF COUNSEL.

Rule 6.1(a) Rights to counsel; waiver of rights to counsel—Right to be represented by counsel.

6.1.a.050 In a criminal DUI case, the suspect has the right to consult with an attorney prior to the administration of a breathalyser test as long as the consultation does not disrupt an ongoing investigation.

State v. Peraza, 239 Ariz. 140, 366 P.3d 1030, ¶¶ 4–15 (Ct. App. 2016) (officer stopped defendant at 5:35 a.m. and arrested him for DUI at 5:45; while at station, defendant invoked right to counsel; officer gave defendant telephone book and said he had 10 minutes to contact attorney; within 10 minutes, defendant twice reached law firm, but was only able to leave message to call back; officer waited until 6:52 a.m., and then conducted breathalyzer tests at 6:56 a.m. and 7:02 a.m.; officer testified he conducted tests because statutory 2-hour window was about to expire; court held officer honored defendant's right to access to counsel and that, if officer delayed tests any further, defendant's conduct might have caused 2-hour window to expire).

RULE 8. SPEEDY TRIAL.

Rule 8.5(b) Continuances—Grounds for motion.

8.5.b.020 The trial court may grant a motion to continue only when extraordinary circumstances exist and the delay is indispensable to the interests of justice; to show abuse of discretion, the party must show prejudice.

State v. Ramos, 239 Ariz. 501, 372 P.3d 1025, ¶¶ 15–20 (Ct. App. 2016) (in September 2013, defendant attempted to obtain Xanax by using a forged script; trial was set for August 5, 2014, and on July 22, 2014, defendant filed stipulation that private attorney would replace public defender and requesting continuance; trial court denied continuance, and private attorney participated as *Knapp* counsel; court held trial court did not abuse discretion in denying continuance, and noted that private attorney did participate during trial, so defendant failed to show prejudice).

RULE 10. CHANGE OF JUDGE OR PLACE OF TRIAL.

Rule 10.2(b) Change of judge on request—Procedure.

10.2.b.020 If the trial court denies the peremptory notice of change of judge, the party must seek review by way of special action; if the party does not do so, that party will have waived that claim on appeal

State v. Ingram, 239 Ariz. 228, 368 P.3d 936, ¶¶ 6–10, 16 (Ct. App. 2016) (defendant challenged on appeal trial court's failure to honor notice of change of judge; court followed reasoning in *Taliaferro v. Taliaferro,* 186 Ariz. 221, 921 P.2d 21 that defendant should have challenged ruling by means of special action, but held on merits trial court ruled correctly).

Rule 10.2(c) Change of judge on request—Time for filing.

10.2.c.010 Generally, a notice of change of judge must be filed within 10 days of notice of assignment; if the judge is assigned fewer than 10 days before trial, notice must be filed by 5:00 p.m. on the next business day after the party receives actual notice of assignment.

State v. Ingram, 239 Ariz. 228, 368 P.3d 936, ¶¶ 14–16 (Ct. App. 2016) (trial was set for 2/03 (Tuesday); case was reassigned to judge on 1/29 (Thursday); defendant filed notice of change of judge on 2/02 (Monday); court rejected defendant's claim that, although his attorney's office received actual notice of assignment 1/29 (Thursday), he had until 2/02 (Monday) because his attorney was out of office and did not see notice of assignment until 1/30 (Friday)).

10.2.c.030 If a judge grants a motion for a redetermination of probable cause and the grand jury returns an indictment under the same cause number, the matter is considered the same case and thus the defendant is not entitled to a peremptory challenge after the new arraignment.

Woodington v. Browning (State), 240 Ariz. 288, 378 P.3d 731, ¶¶ 1–17 (Ct. App. 2016) (in September 2015, defendant was indicted for second-degree murder; Judge Browning granted defendant's motion to remand; grand jury returned new indictment under same cause number; on March 21, 2016, defendant filed notice of change of judge under Rule 10.2; court held that, because this was under same cause number, defendant's time to file notice of change of judge ran from original arraignment in 2015).

Rule 10.4(a) Waiver and renewal—Waiver.

10.4.a.040 A party loses the right to a peremptory change of judge under Rule 10.2 if the party participates before that judge "in any contested matter in that case, an omnibus hearing, any pretrial hearing, a proceeding under Rule 17, or the commencement of trial," even if the party has previously filed a notice of change of judge.

Higuera v. Lee (State), 241 Ariz. 76, 383 P.3d 1150, ¶¶ 2–23 (Ct. App. 2016) (on March 21, defendant's case was assigned to Judge Lee; on March 30, defendant's attorney filed notice of change of judge, but did not provide copy to Judge Lee's chambers; case management conference was set for April 20 and defendant appeared, but defendant's attorney did not appear due to calendaring error; conference was reset for April 27; at April 27 hearing, defendant's attorney informed Judge Lee that he and prosecutor had been "trying to do some plea discussions" and had agreed to another continuance, so conference was continued to May 13; after that date had been set, Judge Lee told attorneys his judicial assistant had discovered the notice of change of judge; Judge Lee ruled that defendant had now waived right to change of judge by appearing and not objecting; court held party waives right to change of judge by appearing at *any* hearing, and because defendant and her attorney appeared at April 27 hearing and did not inform Judge Lee of notice of change of judge, defendant waived right to change of judge).

RULE 11. INCOMPETENCY AND MENTAL EXAMINATIONS.

Rule 11.4 Disclosure of mental health evidence.

11.4.010 If a defendant raises a "guilty except insane" defense, the trial court must order disclosure of unredacted copies of any mental-health evaluations.

State v. Hegyi (Rasmussen), 240 Ariz. 251, 378 P.3d 428, ¶¶ 9–21 (Ct. App. 2016) (defendant hired his own psychologist, who questioned defendant's sanity; court then appointed another psychologist, who opined that defendant met guilty except insane criteria; defendant disclosed both reports to state, but redacted any statements defendant made to psychologist; state then moved to compel disclosure of defendant's redacted statements; court held defendant must provide unredacted copies of both (1) report of his retained psychologist and (2) report of court-appointed psychologist) **(review pending)**.

ARTICLE IV. PRETRIAL PROCEDURES.

RULE 13. INDICTMENT AND INFORMATION.

Rule 13.2(a) Nature and contents—In general.

13.2.a.020 An indictment charging an unknown defendant must contain any name or description by which the person can be identified with reasonable certainty.

State v. Neese, 239 Ariz. 84, 366 P.3d 561, ¶¶ 7–12 (Ct. App. 2016) (in 1999, police determined DNA from several residential burglaries and thefts shared same genetic markers; on March 15, 2005, State filed indictment charging John Doe I and listing genetic markers; in May 2011, State determined DNA sample from defendant matched DNA profile and filed amended indictment substituting defendant's name for John Doe I; court held DNA profile in indictment satisfied "reasonable certainly" requirement).

Rule 13.3(a) Joinder—Offenses.

13.3.a.020 In order to determine whether a statute creates one or more offenses, the court should consider the following: (1) the title of the statute; (2) whether there was a readily perceivable connection between the various acts; (3) whether those acts were consistent with, and not repugnant to, each other; and (4) whether those acts might inhere in the same transaction.

State v. O'Laughlin, 239 Ariz. 398, 372 P.3d 342, ¶¶ 4–14 (Ct. App. 2016) (defendant was charged with possession of burglary tools, "to wit: flashlight, knife, gloves"; on verdict form, trial court listed "flashlight, knife, and/or gloves"; defendant contended he was in effect charged with possessing "flashlight, knife, and gloves," thus indictment was duplicitous (duplicative), so jurors might not have been unanimous in finding him guilty; court held this was one crime that can be committed several ways, so it did not matter whether he possessed one, two, or three burglary tools).

Rule 13.4(b) Severance—As of right.

13.4.b.020 For offenses that are joined because they are of the same or similar character, a defendant is not entitled to severance as a matter of right if evidence of one would be admissible at the trial of the other if the offenses were tried separately.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 54–67 (2016) (defendant contended trial court erred by denying his motion to sever and by permitting joinder of 82 counts charging 74 felonies; court held evidence in question would have been admissible under Rule 404(b) if offenses had been tried separately, thus trial court did not err).

Rule 13.4(c) Severance—Timeliness and waiver.

13.4.c.020 If a defendant moves for a severance prior to trial and the trial court denies the motion, the defendant waives any error if the defendant does not renew the motion either during trial or at the close of the evidence.

State v. Gutierrez, 240 Ariz. 460, 381 P.3d 254, ¶¶ 11–17 (Ct. App. 2016) (after stopping defendant's vehicle and after dog alerted on vehicle, officer arrested defendant and passenger; defendant contended trial court erred in denying his motion to sever his trial from that of his co-defendant; because defendant failed to renew his motion to sever, court reviewed for fundamental error only; each defendant denied possessing drugs and guns, and contended they belonged to other defendant; court held defenses were not mutually exclusive, thus no error).

Rule 13.5(c) Amendment of charges; defects in the charging document—Amendments To Conform to Capital Sentencing Allegations; Challenges to Capital Sentencing Allegations.

13.5.c.030 At hearing to determine whether there is probable cause to believe that an aggravating circumstance exists, the trial court must independently determine if a concurrently charged offense qualifies as a serious offense, but must accept the grand jurors' determination that probable cause exists for the concurrently charged offense.

Allen v. Sanders (State), 240 Ariz. 569, 382 P.3d 784, ¶¶ 2–19 (2016) (state charged defendant with first-degree murder and multiple counts of child abuse, and alleged child abuse offenses as serious offenses under A.R.S. § 13–751(F)(2)).

RULE 15. DISCOVERY.

Rule 15.1(i)(1) Disclosure by state—Additional disclosure in a capital case—Time after arraignment.

15.1.i.120 If the state complies with Rule 16.6 in dismissing a prosecution and obtains a new indictment, the time limits for filing a notice under Rule 15.1(I)(1) start anew, absent bad faith by the state or prejudice to the defendant.

Mesa v. Granville, 241 Ariz. 201, 386 P.3d 387, ¶¶ 8–22 (2016) (state indicted defendant for first-degree murder in May 2014; after receiving new information about circumstances of offense, state obtained new indictment in April 2015 and dismissed 2014 indictment; court found state did not act in bad faith and that defendant was not prejudiced).

Rule 15.7(a) Sanctions—Failure to make disclosure.

15.7.a.050 The court may impose preclusion as a sanction if a party fails to make disclosure required by this Rule.

State v. Ramos, 239 Ariz. 501, 372 P.3d 1025, ¶¶ 7–13 (Ct. App. 2016) (in September 2013, defendant attempted to obtain Xanax by using a forged script; trial was set for August 5, 2014, and on July 22, 2014, defendant filed notice listing his father as alibi witness who would testify that defendant was coaching softball team at time of offense; court held trial court did not abuse discretion in precluding father as alibi witness).

RULE 16. PRETRIAL MOTION PRACTICE; OMNIBUS HEARING.

Rule 16.2(b) Procedure on pretrial motions to suppress evidence—Burden of proof on pretrial motions to suppress evidence.

16.2.b.040 The state has the burden of proving by a preponderance of the evidence the lawfulness of the acquisition of evidence.

State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627, ¶ 11 n.1 (2016) (court noted this rule replaced the clear and convincing evidence standard).

Rule 16.6(d) Dismissal of prosecution—Effect of dismissal.

16.6.d.010 A dismissal of prosecution shall be without prejudice, unless the trial court finds that the interests of justice require that the dismissal be with prejudice.

State v. Martinson, 240 Ariz. x0x, 384 P.3d 307, ¶¶ 13–30 (Ct. App. 2016) (state charged defendant with first degree felony murder and child abuse as result of death of defendant's son; trial court granted defendant's motion to preclude state from presenting evidence and arguing that defendant's intentionally killed child; jurors convicted of both counts; trial court later dismissed charges with prejudice, ruling state had engaged in prosecutorial misconduct and bad faith by "deliberately attempt[ing] to secure a conviction based on an uncharged theory" and by "persistently violat[ing] this Court's *Styers* ruling"; court held state was entitled to pursue theory that defendant committed predicate felony of child abuse with intent to kill child, not merely injure him, thus trial court's ruling was erroneous and dismissal should have been without prejudice).

ARTICLE VI. TRIAL.

RULE 18. TRIAL BY JURY; WAIVER; SELECTION AND PREPARATION OF JURORS.

Rule 18.4(c) Challenges—Peremptory challenges.

18.4.c.100 A *Batson* challenge involves three steps, the **first** of which is that the party must make out a *prima facie* case of purposeful discrimination.

State v. Decker, 239 Ariz. 29, 365 P.3d 954, ¶¶ 7–8 (Ct. App. 2016) (defendant objected to striking of two of three African-American jurors, noting defendant was African-American).

18.4.c.130 A *Batson* challenge involves three steps, the **second** of which is that, once a party has made out a *prima facie* case of purposeful discrimination, the burden shifts to the other party to show a nondiscriminatory explanation for the strike, which need not rise to the level justifying exercise of a challenge for cause.

State v. Decker, 239 Ariz. 29, 365 P.3d 954, ¶ 7 (Ct. App. 2016) (prosecutor struck African-American juror because juror failed to follow trial court's instruction to remain outside courtroom during break; because trial court had observed juror enter the courtroom unaccompanied while attorneys were discussing case, this was race-neutral reason for strike).

State v. Decker, 239 Ariz. 29, 365 P.3d 954, ¶¶ 8–10 (Ct. App. 2016) (prosecutor said he struck African-American juror because she only answered standard biographical questions at end of voir dire and thus prosecutor knew very little about her; because plaintiff struck non-African-American juror for same reason and because prosecutor did not strike one of three African-American jurors, this appeared to be race-neutral reason for strike).

State v. Decker, 239 Ariz. 29, 365 P.3d 954, ¶¶ 8–10 (Ct. App. 2016) (prosecutor said he struck African-American juror because she appeared to have dozed off at times; court found juror's inattentiveness was race-neutral reason for strike).

Rule 18.5(h) Procedure for selecting a jury—Selection of jury.

18.5.h.030 Once deliberations have begun, the trial court has broad discretion to substitute an alternate for one of the selected jurors.

State v. Kolmann, 239 Ariz. 157, 367 P.3d 61, ¶ 17 (2016) (after 6 days of trial and after several hours of juror deliberations, juror told trial court, "I feel like I can't judge anybody" and she "was wrong" in not saying so earlier; after counsel declined to question juror further and more comments from juror, trial court excused her and replaced her with alternate juror; defendant contended his attorney provided ineffective assistance of counsel by not objecting to dismissal of juror; court held trial court had broad discretion to dismiss juror and substitute alternate, thus attorney did not provide ineffective assistance of counsel by not objecting).

18.5.h.040 If the trial court substitutes an alternate for one of the selected jurors while the jurors are in the process of deliberating during one of the phases, the trial court must instruct the jurors to begin deliberations again; failure to do so may be harmless error under the circumstances.

State v. Dalton, 241 Ariz. 182, 385 P.3d 412, ¶¶ 8–29 (2016) (jurors deliberated for just over 2 hours before stopping; one juror said she could not return next day, so trial court said it would bring back alternate juror; when jurors reconvened, trial court did not instruct them to begin deliberations again, but defendant did not object; after about 43 minutes, jurors returned guilty verdict; court rejected defendant's contention that error was structural error, and found defendant failed to show prejudice).

State v. Kolmann, 239 Ariz. 157, 367 P.3d 61, ¶ 18–20 (2016) (after 6 trial days and several hours of deliberations, trial court excused juror and replaced her with alternate; trial court told jurors "to some extent you are going to have to start over"; defendant contended attorney provided ineffective assistance of counsel for not asking trial court to instruct jurors "to begin deliberations anew"; although trial court should have done so, trial court did instruct jurors to start over "to some extent," and thus defendant failed to show prejudice).

RULE 19. TRIAL.

Rule 19.1(a)(3) Conduct of trial—Order of proceedings—Opening statements.

19.1.a.310 The court has discretion to vary the opening statements, as long as the method chosen does not prejudice the defendant.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 86–95 (2016) (defendant was charged in 82 counts with committing 74 various felonies; court held trial court did not abuse discretion in allowing separate opening statements before each of 13 "chapters" of charged conduct).

19.1.a.320 The parties have considerable latitude in making opening statements, but should not include statements that will not or cannot be supported by proof; as long as the party has a good faith basis to believe it will be able to present proffered evidence, the party may refer to it in opening statement.

State v. Pedroza-Perez, 240 Ariz. 114, 377 P.3d 311, ¶¶ 1–17 (2016) (defendant's attorney advised trial court that defendant intended to testify and raise duress defense; trial court reasoned that defendant may choose not to testify, and therefore precluded attorney from mentioning duress and related testimony in opening statement; defendant then provided affidavit of his proposed testimony; trial court did not change its ruling; defendant did testify consistent with facts outlined in affidavit; court held defendant had good faith basis for claiming duress, thus trial court erred in limiting opening statement; court remanded for trial court to determine whether any error was harmless).

Rule 19.1(mmt) Conduct of trial—Motion for mistrial.

19.1.mmt.020 A declaration of a mistrial is the most dramatic remedy for trial error, and should be granted only when it appears that justice will be thwarted unless the jury is dismissed and a new trial granted.

State v. Jean, 239 Ariz. 495, 372 P.3d 1019, ¶¶ 21–25 (Ct. App. 2016) (officers placed GPS device on truck without warrant; officers stopped truck while owner was driving; defendant was in sleeper berth and claimed he was simply driver-in-training; search of truck revealed 2,140 pounds of marijuana; despite admonishment, owner testified about other trips he and defendant had taken to transport marijuana; trial court sustained defendant's objection, struck testimony, and instructed jurors not to consider statements; court held trial court did not abuse discretion in denying defendant's motion for mistrial). **(PR pending.)**

Rule 19.2 Presence of defendant at trial.

19.2.020 A defendant or the defendant's attorney may affirmatively waive the defendant's right to be present at a stage in the proceedings.

State v. Kolmann, 239 Ariz. 157, 367 P.3d 61, ¶¶ 11–13 (2016) (after 6 days of trial and after several hours of juror deliberations, juror told trial court, "I feel like I can't judge anybody" and she "was wrong" in not saying so earlier; after counsel declined to question juror further and more comments from juror, trial court excused her and replaced her with alternate juror; defendant contended his attorney provided ineffective assistance of counsel by waiving his presence; court noted defendant or defendant's attorney may waive defendant's right to be present, and that defendant had failed to show any prejudice by his not being present).

RULE 20. JUDGMENT OF ACQUITTAL.

Rule 20 Judgment of acquittal.

20.020 The trial court should deny a motion for a judgment of acquittal when there is substantial evidence to support a conviction; in determining whether there is substantial evidence, the trial court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 168–79 (2016) (court concluded state presented sufficient evidence, including testimony, reasonable inferences, and circumstantial evidence to support convictions).

ARTICLE VII. POST-VERDICT PROCEEDINGS.

RULE 24. POST-TRIAL MOTIONS.

Rule 24.1(c)(2) Motion for new trial—Prosecutorial misconduct.

24.1.c.210 Both parties are afforded wide latitude in closing argument, thus a defendant is entitled to a new trial only when the prosecutor engages in improper conduct that goes outside of this wide latitude.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 192–204 (2016) (although prosecutor's comments in opening statement likening defendant to "a wolf" and "a wolf in sheep's clothing" were improper, those comments in closing argument were not improper; further, prosecutor's argument about other act evidence did not misstate law).

24.1.c.290 The cumulative error doctrine does apply to claims of prosecutorial misconduct because, even if the several actions are not errors in and of themselves, they may show that the prosecutor intentionally engaged in improper conduct and did so either with indifference or with the specific intent to prejudice the defendant.

State v. Goudeau, 239 Ariz. 421, 372 P.3d 945, ¶¶ 213–14 (2016) (although prosecutor made some improper remarks during opening statement, they did not amount to persistent and pervasive misconduct that deprived defendant of a fair trial.

Rule 24.1(c)(3) Motion for new trial—Juror misconduct.

24.1.c.325 A juror is prohibited from receiving evidence not properly admitted at trial.

State v. Olague, 240 Ariz. 475, 381 P.3d 269, ¶¶ 16–22 (Ct. App. 2016) (defendant contended juror received extrinsic information because she discussed during deliberations that defendant would probably receive probation; court held this was based either on information that juror had before being selected or on what juror heard during trial, neither of which would support motion for new trial).

24.1.c.337 The trial court may grant a new trial if a juror received a bribe or pledged vote.

State v. Olague, 240 Ariz. 475, 381 P.3d 269, ¶¶ 16–20 (Ct. App. 2016) (court rejected defendant's contention that juror had pledged her vote because another juror bullied her into voting certain way).

ARTICLE VIII. APPEAL AND OTHER POST-CONVICTION RELIEF.

RULE 31. APPEAL FROM SUPERIOR COURT.

Rule 31.13(c) Appellate briefs—Contents—Fundamental error.

31.13.c.fe.020 In order to obtain relief on a claim of fundamental error, the defendant must show three things: (1) there was error; and (2) the error was fundamental; and (3) the defendant was prejudiced by the error.

State v. Dalton, 241 Ariz. 182, 385 P.3d 412, ¶¶ 11–29 (2016) (after trial court substituted alternate juror, trial court did not instruct jurors to begin deliberations again; (1) court concluded trial court erred; (2) court assumed, without deciding, that trial court fundamentally erred; but (3) court found defendant failed to show prejudice).

Rule 31.13(c) Appellate briefs—Contents—Structural error.

31.13.c.se.010 The Arizona Supreme Court has described **structural error** as error that (1) deprived the defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and error that (2) affected the entire conduct of the trial from beginning to end, and thus tainted the framework within which the trial proceeded; the Arizona Supreme Court has stated this test in the conjunctive in some cases and in the disjunctive in others.

State v. Pedroza-Perez, 240 Ariz. 114, 377 P.3d 311, ¶¶ 15–17 (2016) (defendant's attorney advised trial court that defendant intended to testify and raise duress defense; trial court reasoned that defendant may choose not to testify, and therefore precluded attorney from mentioning duress and related testimony in opening statement; defendant then provided affidavit of his proposed testimony; trial court did not change its ruling; defendant did testify consistent with facts outlined in affidavit; court held defendant had good faith basis for claiming duress, thus trial court erred in limiting opening statement; court rejected defendant's contention that error was structural and remanded for trial court to determine whether any error was harmless).

Rule 31.13(c) Appellate briefs—Contents—Appellate review.

31.13.c.ar.030 The appellant has the duty to make a record at trial to support the claim of error **on appeal,** and absent such a record, the appellate court will presume that the missing portions of the record support the trial court's actions.

State v. Olague, 240 Ariz. 475, 381 P.3d 269, ¶¶ 5–9 (Ct. App. 2016) (defendant contended trial court should have suppressed his statement because detective's command to tell his side of story was inherently coercive order, and based his argument on precise language used by detective; because defendant did not include on appeal exhibits admitted at suppression hearing, court could rule only on record before it, and found detective's statement was not coercive).

RULE 32. OTHER POST-CONVICTION RELIEF.

Rule 32.1(e) Scope of remedy—Newly-discovered evidence.

32.1.e.011 To warrant post-conviction relief based on newly-discovered evidence, the material must meet five requirements, the **first** of which is that the evidence appears on its face to have existed at the time of trial, but was not discovered until after trial and could not have been discovered until after trial.

State v. Amaral, 239 Ariz. 217, 368 P.3d 925, ¶ 13 (2016) (court noted that evidence must appear on its face to have existed at time of trial, and that rule had not expanded law to grant relief because of facts arising after judgment of conviction and sentencing).

32.1.e.013 To warrant post-conviction relief based on newly-discovered evidence, the material must meet five requirements, the **third** of which is that the evidence must not be merely cumulative or impeaching.

State v. Amaral, 239 Ariz. 217, 368 P.3d 925, ¶¶ 6, 15–19 (2016) (defendant pled guilty to crimes he committed when he was 16 years old; 19 years later, he filed petition for post-conviction relief contending recent scientific findings concerning juvenile psychology and neu-

rology was newly-discovered evidence; court noted that, although research was not conducted until after defendant's sentencing, juvenile behavioral tendencies and characteristics were generally known at time of defendant's sentencing, and trial court had considered those behavioral tendencies and characteristics).

32.1.e.015 To warrant post-conviction relief based on newly-discovered evidence, the material must meet five requirements, the **fifth** of which is that the evidence must be such that it probably would have changed the verdict or sentence if known at the time of the trial.

State v. Amaral, 239 Ariz. 217, 368 P.3d 925, ¶¶ 10–12 (2016) (court clarified that standard under 32.1(e)(5) is whether facts *probably* would have changed verdict or sentence, and not whether they *might* have changed verdict or sentence).

State v. Amaral, 239 Ariz. 217, 368 P.3d 925, ¶¶ 6, 15–19 (2016) (defendant pled guilty to crimes he committed when he was 16 years old; 19 years later, he filed petition for post-conviction relief contending recent scientific findings concerning juvenile psychology and neurology was newly-discovered evidence; court noted that, although research was not conducted until after defendant's sentencing, juvenile behavioral tendencies and characteristics were generally known at time of defendant's sentencing, and trial court had considered those behavioral tendencies and characteristics, and held that this evidence would probably not have changed result).

Rule 32.1(g) Scope of remedy—Significant change in the law.

32.1.g.010 A "significant change in the law" will occur when an appellate court overrules previously binding case law or when a statutory or constitutional amendment makes a definite break from prior case law, but does not occur when a case merely interprets a statutory or constitutional provision already in effect.

State v. Valencia, 241 Ariz. 206, 386 P.3d 392, ¶¶ 14–18 (2016) (court concluded determination in *Montgomery v. Louisiana,* 136 S. Ct. 718 (2016), was significant change in law that entitled petitioner to resentencing).

Rule 32.2(a) Preclusion of remedy—Preclusion.

32.2.a.010 A defendant may not obtain relief on any ground that was not raised, but could have been raised, at trial.

State v. Kolmann, 239 Ariz. 157, 367 P.3d 61, ¶ 25 (2016) (after 6 days of trial and after several hours of juror deliberations, juror told trial court, "I feel like I can't judge anybody" and she "was wrong" in not saying so earlier; after counsel declined to question juror further and more comments from juror, trial court excused her and replaced her with alternate juror; 3 years later, juror signed affidavit recounting the above and that another juror had told her that, if she wanted trial court to "let her go," she should tell trial court she did not feel competent to judge another person; court held that, because defendant could have raised claim of juror misconduct under Rule 24, she was generally precluded from raising that claim in petition for post-conviction relief).

April 10, 2017

CITES 2016 Alphabetically

Allen v. Sanders (State), 240 Ariz. 569, 382 P.3d 784 (2016).r
American Power Prod. v. CSK Auto, Inc, 239 Ariz. 151, 367 P.3d 55 (2016).e
Brown v. McClennen, 239 Ariz. 521, 373 P.3d 538 (2016).C
Higuera v. Lee (State), 241 Ariz. 76, 383 P.3d 1150 (Ct. App. 2016).r
In re C.D., 240 Ariz. 239, 377 P.3d 1034 (Ct. App. 2016).c
In re Foster v. Foster, 240 Ariz. 99, 376 P.3d 702 (Ct. App. 2016).e
In re J.U., 241 Ariz. 156, 384 P.3d 839 (Ct. App. 2016).c
Ishak v. McClennen, 241 Ariz. 364, 388 P.3d 1 (Ct. App. 2016).ce
Kaniowsky v. Pima Cty. Con. Justice Ct., 239 Ariz. 326, 371 P.3d 654 (Ct. App. 2016).C
McGuire v. Lee (State), 239 Ariz. 384, 372 P.3d 328 (Ct. App. 2016).c
Mesa v. Granville, 241 Ariz. 201, 386 P.3d 387 (2016).r
Murray v. Murray, 239 Ariz. 174, 367 P.3d 78 (Ct. App. 2016).e
Phoenix Newspapers v. Reinstein, 240 Ariz. 442, 381 P.3d 236 (Ct. App. 2016).e **(PR pending)**
Rasor v. Northwest Hosp. LLC, 239 Ariz. 546, 373 P.3d 563 (Ct. App. 2016).e **(PR pending)**
Simpson v. Miller (State), 240 Ariz. 208, 377 P.3d 1003 (Ct. App. 2016).Cc **(vacated)**
Spring v. Bradford, 241 Ariz. 455 , 388 P.3d 849 (Ct. App. 2017).e
St. George v. Plimpton, 241 Ariz. 163, 384 P.3d 1243 (Ct. App. 2016).e
Stafford v. Burns, 241 Ariz. 474 , 389 P.3d 76 (Ct. App. 2017).e
State *ex rel.* Montgomery v. Padilla (Simcox), 239 Ariz. 314, 371 P.3d 642 (Ct. App. 2016).Cce
State *ex rel.* Montgomery v. Kemp (Davis), 239 Ariz. 332, 371 P.3d 660 (Ct. App. 2016).C
State *ex rel.* Polk v. Campbell (Kraps), 239 Ariz. 405, 372 P.3d 929 (2016).c
State v. Adair, 241 Ariz. 58, 383 P.3d 1132 (2016).C
State v. Amaral, 239 Ariz. 217, 368 P.3d 925 (2016).r
State v. Becerra, 239 Ariz. 90, 366 P.3d 567 (Ct. App. 2016).C
State v. Burbey, 240 Ariz. 496, 381 P.3d 290 (Ct. App. 2016).c
State v. Causbie, 241 Ariz. 173, 384 P.3d 1253 (Ct. App. 2016).c
State v. Ceasar, 241 Ariz. 66, 383 P.3d 1140 (Ct. App. 2016).c
State v. Cheatham, 240 Ariz. 1, 375 P.3d 66 (2016).C
State v. Chopra, 241 Ariz. 353, 387 P.3d 1282 (Ct. App. 2016).c
State v. Coleman, 241 Ariz. 190 , 385 P.3d 420 (Ct. App. 2016).c
State v. Cope, 241 Ariz. 323, 387 P.3d 746 (Ct. App. 2016).c
State v. Dalton, 239 Ariz. 74, 366 P.3d 133 (Ct. App. 2016).r
State v. Dalton, 241 Ariz. 182, 385 P.3d 412 (2016).r
State v. Decker, 239 Ariz. 29, 365 P.3d 954 (Ct. App. 2016).cr
State v. Denson, 241 Ariz. 6, 382 P.3d 1221 (Ct. App. 2016).c
State v. Florez, 241 Ariz. 121, 384 P.3d 335 (Ct. App. 2016).Cc
State v. Foshay, 239 Ariz. 271, 370 P.3d 618 (Ct. App. 2016).e
State v. Gear, 239 Ariz. 343, 372 P.3d 287 (2016).c
State v. Gill, 240 Ariz. 229, 377 P.3d 1024 (Ct. App. 2016).e **(PR pending)**
State v. Goudeau, 239 Ariz. 421, 372 P.3d 945 (2016).Cre
State v. Gray, 239 Ariz. 475, 372 P.3d 999 (2016).c
State v. Gulley, 240 Ariz. 580, 382 P.3d 795 (Ct. App. 2016).ce **(PR pending)**
State v. Gunches, 240 Ariz. 198, 377 P.3d 993 (2016).C
State v. Gutierrez, 240 Ariz. 460, 381 P.3d 254 (Ct. App. 2016).Ccr
State v. Haskie, 240 Ariz. 269, 378 P.3d 446 (Ct. App. 2016).e **(PR pending)**
State v. Havatone, 241 Ariz. 506, 389 P.3d 1251 (2017).c

State v. Hegyi (Rasmussen), 240 Ariz. 251, 378 P.3d 428 (Ct. App. 2016).cre **(PR pending)**
State v. Holle, 240 Ariz. 300, 379 P.3d 197 (2016).c
State v. Huez, 240 Ariz. 406, 380 P.3d 103 (Ct. App. 2016).C
State v. Ingram, 239 Ariz. 228, 368 P.3d 936 (Ct. App. 2016).cre
State v. James, 239 Ariz. 367, 372 P.3d 311 (Ct. App. 2016).c
State v. Jean, 239 Ariz. 495, 372 P.3d 1019 (Ct. App. 2016).Cre **(PR pending)**
State v. Johnson, 240 Ariz. 402, 380 P.3d 99 (Ct. App. 2016).c
State v. Jurden, 239 Ariz. 526, 373 P.3d 543 (2016).c
State v. Kjolsrud, 239 Ariz. 319, 371 P.3d 647 (Ct. App. 2016).Cc
State v. Koepke, 240 Ariz. 188, 377 P.3d 385 (Ct. App. 2016).C
State v. Kolmann, 239 Ariz. 157, 367 P.3d 61 (2016).r
State v. Lara, 240 Ariz. 327, 379 P.3d 224 (Ct. App. 2016).c
State v. Leon, 240 Ariz. 492, 381 P.3d 286 (Ct. App. 2016).Cc
State v. Maciel, 240 Ariz. 46, 375 P.3d 938 (2016).C
State v. Martinson, 241 Ariz. 93, 384 P.3d 307 (Ct. App. 2016).cr
State v. Navarro, 241 Ariz. 19, 382 P.3d 1234 (Ct. App. 2016).Cc
State v. Neese, 239 Ariz. 84, 366 P.3d 561 (Ct. App. 2016).Ccr
State v. Nissley, 241 Ariz. 327, 387 P.3d 1256 (2017).Cc
State v. O'Laughlin, 239 Ariz. 398, 372 P.3d 342 (Ct. App. 2016).cr
State v. Olague, 240 Ariz. 477, 381 P.3d 269 (Ct. App. 2016).cr
State v. Panos, 239 Ariz. 116, 366 P.3d 1006 (Ct. App. 2016).c
State v. Pedroza-Perez, 240 Ariz. 114, 377 P.3d 311 (2016).r
State v. Peltz, ___ Ariz. ___, ___ P.3d ___ (Ct. App. Mar. 2, 2017).c
State v. Peoples, 240 Ariz. 244, 378 P.3d 421 (2016).C
State v. Peraza, 239 Ariz. 140, 366 P.3d 1030 (Ct. App. 2016).cr
State v. Primous, 239 Ariz. 394, 372 P.3d 338 (Ct. App. 2016).C **(PR pending)**
State v. Ramos, 239 Ariz. 501, 372 P.3d 1025 (Ct. App. 2016).r
State v. Romero, 239 Ariz. 6, 365 P.3d 358 (2016).e
State v. Romero, 240 Ariz. 503, 381 P.3d 297 (Ct. App. 2016).e
State v. Ruiz, 239 Ariz. 379, 372 P.3d 323 (Ct. App. 2016).C
State v. Sisco, 239 Ariz. 532, 373 P.3d 549 (2016).C
State v. Snyder, 240 Ariz. 551, 382 P.3d 109 (Ct. App. 2016).C
State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939 (2016).e
State v. Stoll, 239 Ariz. 292, 370 P.3d 1130 (Ct. App. 2016).Cc
State v. Turner, 239 Ariz. 390, 372 P.3d 334 (Ct. App. 2016).c
State v. Valencia, 239 Ariz. 255, 370 P.3d 124 (Ct. App. 2016).r
State v. Valencia, 241 Ariz. 206, 386 P.3d 392 (2016).r
State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627 (2016).Ccr
State v. Wasbotten, 239 Ariz. 492, 372 P.3d 1016 (Ct. App. 2016).Cc
State v. Wright, 239 Ariz. 284, 370 P.3d 1122 (Ct. App. 2016).e
Woodington v. Browning (State), 240 Ariz. 288, 378 P.3d 731 (Ct. App. 2016).r
Wright v. Gates (State), 240 Ariz. 525, 382 P.3d 83 (Ct. App. 2016).c

CITES 2016 by Reporter

State v. Romero, 239 Ariz. 6, 365 P.3d 358 (2016).e
State v. Decker, 239 Ariz. 29, 365 P.3d 954 (Ct. App. 2016).cr

State v. Dalton, 239 Ariz. 74, 366 P.3d 133 (Ct. App. 2016).r
State v. Neese, 239 Ariz. 84, 366 P.3d 561 (Ct. App. 2016).Ccr
State v. Becerra, 239 Ariz. 90, 366 P.3d 567 (Ct. App. 2016).C
State v. Panos, 239 Ariz. 116, 366 P.3d 1006 (Ct. App. 2016).c
State v. Peraza, 239 Ariz. 140, 366 P.3d 1030 (Ct. App. 2016).cr

American Power Prod. v. CSK Auto, Inc, 239 Ariz. 151, 367 P.3d 55 (2016).e
State v. Kolmann, 239 Ariz. 157, 367 P.3d 61 (2016).r
Murray v. Murray, 239 Ariz. 174, 367 P.3d 78 (Ct. App. 2016).e

State v. Amaral, 239 Ariz. 217, 368 P.3d 925 (2016).r
State v. Ingram, 239 Ariz. 228, 368 P.3d 936 (Ct. App. 2016).cre

State v. Valencia, 239 Ariz. 255, 370 P.3d 124 (Ct. App. 2016).r
State v. Foshay, 239 Ariz. 271, 370 P.3d 618 (Ct. App. 2016).e
State v. Wright, 239 Ariz. 284, 370 P.3d 1122 (Ct. App. 2016).e
State v. Stoll, 239 Ariz. 292, 370 P.3d 1130 (Ct. App. 2016).Cc

State v. Valenzuela, 239 Ariz. 299, 371 P.3d 627 (2016).Ccr
State *ex rel.* Montgomery v. Padilla (Simcox), 239 Ariz. 314, 371 P.3d 642 (Ct. App. 2016).Cce
State v. Kjolsrud, 239 Ariz. 319, 371 P.3d 647 (Ct. App. 2016).Cc
Kaniowsky v. Pima Cty. Con. Justice Ct., 239 Ariz. 326, 371 P.3d 654 (Ct. App. 2016).C
State *ex rel.* Montgomery v. Kemp (Davis), 239 Ariz. 332, 371 P.3d 660 (Ct. App. 2016).C

State v. Gear, 239 Ariz. 343, 372 P.3d 287 (2016).c
State v. James, 239 Ariz. 367, 372 P.3d 311 (Ct. App. 2016).c
State v. Ruiz, 239 Ariz. 379, 372 P.3d 323 (Ct. App. 2016).C
McGuire v. Lee (State), 239 Ariz. 384, 372 P.3d 328 (Ct. App. 2016).c
State v. Turner, 239 Ariz. 390, 372 P.3d 334 (Ct. App. 2016).c
State v. Primous, 239 Ariz. 394, 372 P.3d 338 (Ct. App. 2016).C **(PR pending)**
State v. O'Laughlin, 239 Ariz. 398, 372 P.3d 342 (Ct. App. 2016).cr
State *ex rel.* Polk v. Campbell (Kraps), 239 Ariz. 405, 372 P.3d 929 (2016).c
State v. Steinle (Moran), 239 Ariz. 415, 372 P.3d 939 (2016).e
State v. Goudeau, 239 Ariz. 421, 372 P.3d 945 (2016).Cre
State v. Gray, 239 Ariz. 475, 372 P.3d 999 (2016).c
State v. Wasbotten, 239 Ariz. 492, 372 P.3d 1016 (Ct. App. 2016).Cc
State v. Jean, 239 Ariz. 495, 372 P.3d 1019 (Ct. App. 2016).Cre **(PR pending)**
State v. Ramos, 239 Ariz. 501, 372 P.3d 1025 (Ct. App. 2016).r

Brown v. McClennen, 239 Ariz. 521, 373 P.3d 538 (2016).C
State v. Jurden, 239 Ariz. 526, 373 P.3d 543 (2016).c
State v. Sisco, 239 Ariz. 532, 373 P.3d 549 (2016).C
Rasor v. Northwest Hosp. LLC, 239 Ariz. 546, 373 P.3d 563 (Ct. App. 2016).e **(PR pending)**

State v. Cheatham, 240 Ariz. 1, 375 P.3d 66 (2016).C
State v. Maciel, 240 Ariz. 46, 375 P.3d 938 (2016).C

In re Foster v. Foster, 240 Ariz. 99, 376 P.3d 702 (Ct. App. 2016).e

State v. Pedroza-Perez, 240 Ariz. 114, 377 P.3d 311 (2016).r
State v. Koepke, 240 Ariz. 188, 377 P.3d 385 (Ct. App. 2016).C
State v. Gunches, 240 Ariz. 198, 377 P.3d 993 (2016).C
Simpson v. Miller (State), 240 Ariz. 208, 377 P.3d 1003 (Ct. App. 2016).Cc **(vacated)**
State v. Gill, 240 Ariz. 229, 377 P.3d 1024 (Ct. App. 2016).e **(PR pending)**
In re C.D., 240 Ariz. 239, 377 P.3d 1034 (Ct. App. 2016).c

State v. Peoples, 240 Ariz. 244, 378 P.3d 421 (2016).C
State v. Hegyi (Rasmussen), 240 Ariz. 251, 378 P.3d 428 (Ct. App. 2016).cre **(PR pending)**
State v. Haskie, 240 Ariz. 269, 378 P.3d 446 (Ct. App. 2016).e **(PR pending)**
Woodington v. Browning (State), 240 Ariz. 288, 378 P.3d 731 (Ct. App. 2016).r

State v. Holle, 240 Ariz. 300, 379 P.3d 197 (2016).c
State v. Lara, 240 Ariz. 327, 379 P.3d 224 (Ct. App. 2016).c

State v. Johnson, 240 Ariz. 402, 380 P.3d 99 (Ct. App. 2016).c
State v. Huez, 240 Ariz. 406, 380 P.3d 103 (Ct. App. 2016).C

Phoenix Newspapers v. Reinstein, 240 Ariz. 442, 381 P.3d 236 (Ct. App. 2016).e **(PR pending)**
State v. Gutierrez, 240 Ariz. 460, 381 P.3d 254 (Ct. App. 2016).Ccr
State v. Olague, 240 Ariz. 477, 381 P.3d 269 (Ct. App. 2016).cr
State v. Leon, 240 Ariz. 492, 381 P.3d 286 (Ct. App. 2016).Cc
State v. Burbey, 240 Ariz. 496, 381 P.3d 290 (Ct. App. 2016).c
State v. Romero, 240 Ariz. 503, 381 P.3d 297 (Ct. App. 2016).e

Wright v. Gates (State), 240 Ariz. 525, 382 P.3d 83 (Ct. App. 2016).c
State v. Snyder, 240 Ariz. 551, 382 P.3d 109 (Ct. App. 2016).C
Allen v. Sanders (State), 240 Ariz. 569, 382 P.3d 784 (2016).r
State v. Gulley, 240 Ariz. 580, 382 P.3d 795 (Ct. App. 2016).ce **(PR pending)**
State v. Denson, 241 Ariz. 6, 382 P.3d 1221 (Ct. App. 2016).c
State v. Navarro, 241 Ariz. 19, 382 P.3d 1234 (Ct. App. 2016).Cc

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Affirmed, Vacated, Reversed, or Overruled

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vac'd, 239 Ariz. 343, 372 P.3d 287 (2016).

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April 10, 2017